87-632
NO.

Supreme Court, U.S.
FILED
OCT 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1987

DOLORES B. CALLAHAN wife of/and
GERARD CALLAHAN
Plaintiff-Appellants

versus

SOUTH CENTRAL BELL TELEPHONE COMPANY
Defendant-Appellee

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

John F. Tooley, Jr.
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Gretna, Louisiana 70056
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Gerard Callahan

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QUESTIONS PRESENTED

1. Whether the lower Federal Courts were correct in determining that the Federal Courts have no authority under the *Employee Retirement Income Security Act,* 29 U.S.C.A., Sections 1001-1391, particularly, 29 U.S.C. 1132, to disturb a Committee finding of work capability and force an injured employee off disability into retirement.

2. Is the first question particularly true where; the Committee finding is shown incorrect on its face as failing to give the treating physicians' opinions their due under Louisiana law; the information supplied to the Committee by its New Orleans section was knowingly misleading and slanted; the issue was rapidly brought up and completed to save money for the Company; all of the above was alleged and being shown in discovery at the trial level; and the trial court granted summary judgment and the appellant court summarily affirmed.

3. Shouldn't the case have been remanded for trial where the trial court could, if the errors were shown, remanded the matter back to the Committee or order plaintiff's benefits reinstated, since the company can always resubmit the issue to the Committee whereas the worker's adverse decision is final for all time.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

DOLORES B. CALLAHAN wife of/and
GERARD CALLAHAN
Plaintiff-Appellants

versus

SOUTH CENTRAL BELL TELEPHONE COMPANY
Defendant-Appellee

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT[1]

PRAYER

Petitioners pray for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review the Judgment of that Court entered on July 24, 1987.

OPINIONS BELOW

Both opinions of the Fifth Circuit are unpublished. Their contents in full are annexed in the Appendix, pages.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

---

[1] The Caption of the case contains the names of all parties. Counsel for South Central Bell is Nancy B. White.

EXISTENCE OF PROPER JURISDICTION BELOW

Our action arises out of the *Employee Retirement Security Act*, 29 United States Code, 1332, wherein the Federal Courts are specifically granted jurisdiction.

STATEMENT

Mrs. Callahan tripped while at work and was placed on disability under th e Plan administered and maintained pursuant to ERISA. She was paid full disability through March 30, 1985, when she was denied disability. Defendant denied neither her accident nor her disability until that time.

Plaintiff's, Mrs. Callahan and her husband (since Louisiana is a community property State), filed suit in the United States Disstrict court of the Eastern Court of Louisiana against South Central Bell under 29 U.S.C. 1132 for reconsideration of a Committee finding that she was no longer disabled and must return to work.[2] Plaintiff alleged, and through discovery, was proving that the Committee reacted to an effort by a newly appointed supervisor to cut his office budget, eliminate her from disability and force her to retire.[3]

Summary Judgment was granted to South Central Bell, and the United Fifth Circuit Court of Appeals affirmed, without publication, on the basis of the "well settled" law that a Committee decision cannot be reviewed by a Federal Court unless it is completely "arbitrary and capricious." Plaintiff alleged that the decision was

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[2] Pps. A-52.

[3] Pps. A-55 and A-63.

arbitrarily and capriciously set up, she filed affidavits in support of her argument, and even showed on the face of the Committee's decision that it violated her Louisiana contract rights.[4]

The facts set forth in the report from the New Orleans Disability Office to the Committee were shown to be slanted and inaccurate; in that, the office manager misled the disability office into writing the report as if Mrs. Callahan was faking a disability. Further, the deposition testimony showed they failed to provide their own physicians with each others' reports, so that the ear specialist said she would fall down only half the time, (which the orthopedist was not aware of), and which, had he known, he would have agreed with her treating physican that she was permanently disabled with disc injuries.

All of the above was properly pleaded in the Opposition for Summary Judgment, but, none of these facts were of any moment to the lower Federal Courts.

REASONS FOR GRANTING THE PETITION

This Summary Judgment is frightening. Counsel is not a labor specialist and, dispite serious efforts, no such expertise could be obtained. As Justsice Brennan recently said in New Orleans, "Every lawyer regardless of his specialty can and must contribute to the elimination of inequities...".

Plaintiff's right under 29 U.S.C. 1132 is an equitable remedy. The Telephone company can review and monitor

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[4] The Committee's burden of proof was opposite to its finding. *Schouest vs. J. Ray McDermott and Co., Inc.*, 411 So.2d 1042 (Supp. Ct.La.-1982). *Ramsey vs. Dragon, Ltd.*, 448 So.2d 745 (La.App. 4-1984); and *Bourgeois vs. Bill Watson's Investments, Inc.*, 458 So.2d 167 (La.App. 5-1984).

her disability entitlements for the rest of her life. However, should a Committee be rushed to judgment she can easily be star-chambered out of her benefits.

This case is an ideal vehicle to determine that a working person has some rights under the *Employee Retirement Security Act,* whatever they might be.[5] The summary dismissal of Mrs. Callahan's petition on the basis of a Committee report shown to be defective on its face, and allegedly a result of intentional inaccuracy, cannot equitably be supported. In most cases the Committees have acted reasonably.[6] In this case plaintiffs are entitled to further due process and a hearing on her entitlement to disability.

The Court should go further and substitute a "clearly erroneous" or "preponderance of the evidence" test for the "arbitrary and capricious" barrier imposed by the lower Courts. Labor law should not be some mystical language cutting off working persons rights. The statute is clearly an equitable one authorizing a Federal Judge to correct any error of a Committee, and the plaintiff's burden should be the same as in any other case. The statute does not presume that a Federal Judge will act arbitrarily or capriciously, but grants Jurisdiction in equity upon complaint and proof. The present burden is insurmountable, despite convincing allegations and evidence of error..

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[5] *Seafarers Pension Plan vs. Sturgis,* 630 F.2d 218 (CA 4-1980); *Bickle vs. Long Term Disability Plan of Western Electric,* 541 F. Supp. 685 (E.D. Pa. 1982)

[6] *Bayles vs. Central States, Southeast and Southwest Pension Fund,* 602 F.2d 97 (CA 5-1979); *Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.,* 637 F.2d 357 (CA 5-1981); *Palino vs. Casey,* 664 F.2d 854 (CA 1-1981); *Gehrardt vs. General Motor Corp.,*581 F.2d 7 (CA 2-1978); *Adams vs. New Hersey Brewery Employees' Pension Fund, Local Union 843,* 670 F.2d 387 (CA 3-1982); *Wardle vs. Central States, Southeast and Southwest Area Pension Fund,* 627 F.2d 820 (CA 7-1980); *Miller vs. Associated Pension Trusts, Inc.,* 541 F.2d 726 (CA 8-1986); *Miranda vs. Audia,* 681 F.2d 1124 (CA 9-1982); *Martinez vs. Seafarers International Union of North America,* 576 F.2d 939 (CA 1-1978); *Riley vs. MEBA Pension Trust,* 570 F.2d 406, 410 (CA 2-1977); and *Glover vs. South Central Bell Telephone Co.,* 664 F.2d 1155 (CA 5-1981).

The rationale seems to be that a Committee must protect the fund. Must we say that a Federal Judge cannot do likewise, and individual disabled workers must bear the financial loss when a Committee is in error? If the Committee's decision was wrong, it was wrong. The purpose of equity is to right a wrong. That is what the statute directs the Federal Courts to do, not to invent barriers.

CONCLUSION

The Judgment of the Fifth Circuit Court of Appeal of July 24, 1987 should be reversed and this matter remanded for trial. It would be helpful for the Court to determine if the the lower Federal Court should decide the issues or remand it back to the Committee for decision.[7]

RESPECTFULLY SUBMITTED

JOHN F. TOOLEY, JR.
GROSZ & TOOLEY,
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Gretna, Louisiana 70056
Telephone: (504) 364-1076
Attorney for
Mr. & Mrs. Gerard Callahan

CERTIFICATE OF SERVICE

I do hereby certify that I have on this ____ day of October, 1987 served a copy of the foregoing on all parties by mailing the same by United States Mail, properly addressed, and First Class postage prepaid.

JOHN F. TOOLEY, JR.
418 Wright Avenue
Gretna, Louisiana 70056
Telephone: (504) 364-1076

[7] Supra, FN5

APPENDIX A

DOCKET ENTRIES

86-0453
H-1

PLAINTIFFS	DEFENDANTS
Dolores B. Callahan wife of and Gerard Callahan	South Central Bell Telephone Company Bell System Savings and Security Plan Bankers Trust Company Amended Complaint 3-25-86 No New Parites

cause
(cite the U.S. Civil Statute Under Which the case
is filed and write a brief statement of cause)
violation of Employee Retirement Security Act
Failure to Pay Benefits
29 USC 1001-1381

ATTORNEYS

John F. Tooley, Jr., Esq. 418 Wright Avenue Gretna, LA 70056 (504) 364-1076 FOR *DOLORES B. CALLAHAN* *Gerard Callahan*	Nancy B. White, Esq. 365 Canal St., Room 1870 New Orleans, LA 70140 (504) 528-2003 FOR *South Central bell* *Telephone Co.*

CLERK'S OFFICE
A True Copy
DEC 30 1986

DATE	NR.	86-0453 PROCEEDINGS
1/30/86	1	COMPLT; issd (3) summs.
3/12/86	2	ANSWER of South Central Bell Telephone Co. to Pltf's complt.
3/12/86	3	Ntc of call docket set 4/2/86 at 9:00 a.m. bfr Judge
3-20-86	4	Pltf's Mtn & ORDER that same is GRANTED leave to file suppl & amended complt. (AGD) 3-25-86, DKTD 3-26-86.
3-25-86	5	Pltf's Suppl & Amended complt. (No new parties) Issd 1 sms.
3-24-86	4a	Mtn by deft Bankers Trust Company & ORDER that same is GRANTED an addl 20 days w/in which to file responsive pleadings. (AGD) 3-25-86. DKTD 3-26-86.
4-2-86	6	Rtn on S&C avd 3-20-86 to Bankers Trust Company; svd 2-24-86 to South Central Bell Telephone Company; and Bell System Savings Plan, no svc instructions.
4-3-86	7	M.E.: 4-2-86; Case Called - Passed 60 days. (AGD) dktd 4-4-86.
5-7-86	8	Mtn by deft South Central Bell for Summ Judg. Hrg set 6-25-86 at 9:00 a.m. bfr Judge.
5-7-86	9	Note of Evidence by deft South Central Bell.
5-27-86	10	Pltf's reg & feissd 1 sms.
5-27-86	11	Ret on subps svd 5-27-86 to South Central Bell.
5-29-86	12	Pltf's Mtn & ORDER that hrg of 6-25-86 is CONT to 8-13-86 at 9:00 a.m. bfr Judge. (AGD) 5-28-86. DKTD 5-29-86.
6-9-86	13	Pltf's Mtn & ORDER that claims agst Bankers Trust Company are DISMISSED, each pty to bear own costs. (AGD) 6-10-86.
		MULTIPLE PARTY DISMISSAL
6-27-86	14	Pltf's ntc of dep of Dr. Ted Borgman on 7-3-86.
6-27-86	15	Pltf's ntc of dep of Debbie Heilman, formerly Debra Hassen on 7-7-86.
6-27-86	16	Pltf's ntc of dep of Nola Fee & Pete Evans on 7-25-86.
6-27-86	17	Pltf's ntc of dep of Dr. A.N. Diodene on 7-15-86.
6-27-86	18	Pltf's ntc of dep of Floyd W. Smith & Jill Miller on 7-22-86.

PLAINTIFF	DEFENDANT	DOCKET NO.
Deloris B. Callahan, Et Al	South Central Bell Telephone Co. Et AL	86-453 "H" Pg 2 of __ pgs

DATE	NR.	PROCEEDINGS
6-27-86	19	Pltfsn ntc of dep of Carol LeGrange & Virginia Roper on 7-17-86.
8-4-86	20	Pltfs' Mtn & ORDER that hrg on Mtn for Summ Judg set 8-13-86 is CONT to 10-22-86 at 9:00 a.m. bfr Judge. (CSjr) DKTD 8-5-86.
9-22-86	21	Ntc of CALL DKT set 10-22-86 at 9:00 a.m. bfr Judge.
10-14-86	12	Pltf's reg & reissd 1 sms.
10-15-86	23	Pltfs' Memo in Opp to Summ Judg.
10-15-86	24	Pltfs' Memo in Opp to Mtn to Dismiss Under Rule 4(J).
10-16-86	25	Pltfs' Suppl Opp to Summ Judg.
10-14-26	26	Mtn by South Central bell & ORDER that Hrg. on Mtn to Dismiss is set 10-22-86 at 9:00 a.m. bfr Judge (CSjr) DKTD 10-17-86.
10-17-86	27	Mtn by South Central Bell to Dismiss.
10-22-86	28	Hrg on mtn of South Central bell for Summm judg - GRANTED; Mtn of South Central Bell to dismiss pursuant to Rule 4(J) - GRANTED, dismissing w o prej the amended complt (AGD) DKTD 10-23-86.
10-23-86	29	CASE CALLED - On oral mtn of pltf, Bell System Savings & Security Plan is DISMISSED (AGD) DKTD 10-23-86. MULTIPLE PARTY DISMISSAL
10-23-86	30	JUDG - in favor of South Central Bell & Agst pltfs dismissing w/o prej complt at pltfs' cost (AGD) DKTD 10-23-86. CLOSED CASE
10-30-86	31	Pltf's Mtn for New Trial. Hrg set 12-3-86 at 9:00 a.m. bfr Judge.
11-18-86	32	Pltfs' Suppl Memo.
11-21-86	33	Memo in Opp by South Central Bell to Mtn for New Trial.

PLAINTIFF	DEFENDANT	DOCKET NO.
Deloris B. Callahan, Et Al	South Central Bell Telephone CO. Et AL	86-453 "H" Pg 2 of __ pgs

DATE	NR.	PROCEEDINGS
12-1-86	34	M.E. 12-1-86: Pltfs' Mtn for New Trial is treated as a Mtn to ALter or Amend Judg - DENIED. Mtn by deft for Sanctions is DENIED. (AGD) DKTD 12-2-86.
12-12-86	35	Pltfs' Ntc of Appeal of orders entered 12-2-86 & 10-22-86.
12-12-86	36	Pltfs' Composition of Record.
12-16-86	XX	Ntc. of Appeal fwd. to all parties (PNC)

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
JAN 30, 1986

DOLORES B. CALLAHAN wife of/and GERARD CALLAHAN — CIVIL ACTION

VERSUS — NO. 86-0453
SECTION H
Mag. 1

SOUTH CENTRAL BELL TELEPHONE COMPANY, BELL SYSTEM SAVINGS AND SECURITY PLAN and BANKERS TRUST COMPANY

FILED:_____ _____
DEPUTY CLERK

COMPLAINT

Petitioners are persons of the full age of majority and residents of the Parish of Jefferson, State of Louisiana.

I

Defendants are corporations authorized to do and doing business in the State of Louisiana, and by whom, Dolores B. Callahan was employee in this State.

II

Dolores B. Callahan was long employed by the South Central Bell Company and is entitled to benefits under the Employee Retirement Security Act 29 U.S.C.A., Section 1001-1381. After she was injured on the job, and was paid

full disability through March 30, 1985 on that date she was denied disability from which appeals were properly made until August 26, 1985, when a final order denying her claim by defendants as trustees of the Employees' Benefit Claim Review Committee was issued.

III

The committee acted arbitrarilly and in a capricious manner: failed to supply or even disclose a report by a Dr. Chepley Yelton and Dr. R. A. Spector: based their opinion on reports not suported by the evidence: acted in bad faith in intentionally using certain evidence known to be questionable; and erroneousy-as a question of law-failed to provide her treating physician's testimony the weight it should be accorded according to law.

WHEREFORE, petitioners pray for service and citations; and for judgement in favor of petitioners against defendants reinstating her disability benefits and/or remanding the matter to the committee for recovery of her benefits with proper instructions; to enforce her rights at a proper hearing; and to clarify her rights under 29 U.S.C. 1132 (1)(B).

/s/John F. Tooley,Jr.
JOHN F. TOOLEY, JR.
743 Terry Parkway
Gretna, Louisiana 70056
Telephone: (504) 394-7077
Plaintiffs Attorney

PLEASE SERVE:

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of service Richard D. Cilleaud
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New Orleans, Louisiana 70140

Maurse Naquin, Jr.
365 Canal Street, Room 1870
New Orleans, Louisiana 70140

Bell System Savings and
Security Plan through their
Legal Department
365 Canal Street, Room 1870
New Orleans, Louisiana 70140

Bankers Trusts Company
through the Secretary
of State, Legal Services
7051 Florida Blvd.
Baton Rouge, Louisiana 70806

United States Secretary
of Labor through
William Brock
Franses Perkins Blvd.
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Washington, D.C. 20210

United States Secretary
of Treasury through
James Baker, III
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Washington, D.C. 20220

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
MAR 12 1986

DOLORES B. CALLAHAN wife of/and GERARD CALLAHAN	*	CIVIL ACTION
	*	No. 86-0453
VERSUS	*	
	*	SECTION H
SOUTH CENTRAL BELL TELEPHONE COMPANY, BELL SYSTEM SAVINGS AND SECURITY PLAN and BANKERS TRUST COMPANY	*	Mag. 1

****

ANSWER TO ORIGINAL COMPLAINT

NOW INTO COURT, through undersigned counsel, comes South Central Bell Telephone Company, named defendant herein, who for Answer to plaintiff's Original Complaint hereby respectfully avers that:

FIRST DEFENSE

The Complaint fails to state a claim against defendant upon which relief can be granted.

SECOND DEFENSE

The Complaint was not timely filed.

THIRD DEFENSE

For answer to the numbered paragraphs of the Original Complaint, defendant avers that:

1.

Defendant, South Centeral Bell Telephone Company, admits its status as alleged in Paragraph I and denies the remaining allegations of Paragraph I as those allegations affect or pertain this defendant.

2.

Defendant denies the allegations of Paragraph II and further states that plaintiff filed a claim under defendant's Sickness and Accident Disability Benefit Plan and that the claim was rejected in accordance with the terms and conditions of the Plan.

3.

Defendanat denies the allegations of Paragraph III.

FOURTH DEFENSE

This Court's jurisdiction with respect to any claim for sickness and/or accident disability benefits is limited to a determination of whether the actions of defendant's Employees Benefit Claim Review Committee were arbitrary and capricious and a trial *de novo* of this issue is impermissible.

FIFTH DEFENSE

The decision of defendant's Employees Benefit Claim Review Committee denying plaintiff sickness

disability benefits, was not arbitrary and capicious, and therefore, is conclusive and binding on the plaintiff.

SIXTH DEFENSE

In the alternative, and only in the event that sickness disability benefits are awarded to plaintiff herein, defendant avers that plaintiff has sued South Central Bell Telephone Company under the docket of the 24th Judicial District Court, Parish of Jefferson, alleging an on-the-job injury. South Central Bell Telephone Company avers that any amount awarded in the workmen's compensation suit should be offset against such sickness benefits pursuant to the offset provision of the Plan.

WHEREFORE, defendant prays that this Court reject petitioner's demands in their entirety, and that after due proceedings are had, this lawsuit be dismissed in its entirety and that defendant be awarded costs of these proceedings and attorney's fees, pursuant to Section 502 of ERISA.

Respectfully submitted,

/s/ Nancy B. White

Nancy B. White
365 Canal Street, Room 1870
New Orleans, Louisiana 70140
Telephone: (540) 528-2003
Attorney for South Central Bell
Telephone Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Answer as[sic] been forwarded to counsel for the plaintiff by depositing same in the U.S. Mail, postage prepaid, this 12th day of March, 1986.

/s/ NANCY B. WHITE
Nancy B. White

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
MAR 25, 1986

DOLORES B. CALLAHAN wife of/and GERARD CALLAHAN — CIVIL ACTION

VERSUS — NO. 86-0453
SECTION H
Mag. 1

SOUTH CENTRAL BELL TELEPHONE COMPANY, BELL SYSTEM SAVINGS AND SECURITY PLAN and BANKERS TRUST COMPANY

FILED: _____ _____
DEPUTY CLERK

SUPPLEMENTAL AND AMENDING COMPLAINT

The Supplemental and Amending Complaint of Dolores B. Callahan wife of/and Gerard Callahan with respect represents:

IV

South Central Bell Telephone Company terminated Dolores B. Callahan from employment on April 8, 1985 as a result of her disability in a plan or consperacy to reduce its obligation to her under the Pention and Disability Plans, to force her to retire because of her age and in other respects in violation of 29 U.S.C. 623 and 1451 and the Civil Rights Act of 1964.

V

She has thereby suffered damages in the full and true sum of NINTEEN MILLION DOLLARS ($19,000,000.00).

WHEREFORE, petitioners pray for service and citations on South entral Bell Telephone Comapny; and an additional Judgment in favor of plaintiffs and against South Central Bell Telephone Company in the full and true sum of NINTEEN MILLION DOLLARS ($19,000,000.00) and for jury trial.

/s/ JOHN F. TOOLEY, JR.
JOHN F. TOOLEY, JR.
743 Terry Parkway
Gretna, Louisiana 70056
Telephone: (504) 394-7077

PLEASE SERVE:

SOUTH CENTRAL BELL TELEPHONE COMPANY
through their agent of service
Richard D. Cilleaud
365 Canal Street, Room 1870
New Orleans, Louisiana

CERTIFICATE OF SERVICE
Illegible(stamped)
MARCH 20, 1986

/s/ John F. Tooley, Jr.
JOHN F. TOOLEY, JR.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
MAY 7 1986

DOLORES B. CALLAHAN wife of/and GERARD CALLAHAN	*	CIVIL ACTION
	*	No. 86-0453
VERSUS	*	
	*	SECTION H
SOUTH CENTRAL BELL TELEPHONE COMPANY, BELL SYSTEM SAVINGS AND SECURITY PLAN and BANKERS TRUST COMPANY	*	Mag. 1

* *

MOTION FOR SUMMARY JUDGMENT

NOW INTO COURT, through undersigned counsel, comes defendant, South Central Bell Telephone Company, and pursuant to Federal Rule of Civil Procedure 56, moves for summary judgment, there being no material facts in dispute and defendant being entitled to judgment as a matter of law, on the following grounds and for the following reasons, all as more fully set forth in the afficavits, exhibits, and memoranda filed in conjunction herewith:

1.

The scope of judicial review by this Honorable Court, as to plaintiff's claim for sickness disability benefits, is limited to determining whether the disability plan trustees acted arbiritrarily or capriciously in denying plaintiff's claim for sickness disability benefits for a period of one week, commencing on March 27, 1985, and plaintiff is not entitled to a trial *de novo*.

2.

The undisputed material facts demonstrate that defendant's administrative process, culminating with the denial of plaintiff's claim for sickness Committee, was not arbitrary or capricious.

3.

Defendant is entitled to judgment as a matter of law since the denial of plaintiff's claim for sickness disability benefits for a period of one week commencing on March 27, 1985, was not arbitrary or capicious.

Respectfully subbitted,

/s/ Nancy B. White

Nancy B. White
365 Canal Street, Room 1870
New Orleans, Louisiana 70140
Telephone: (504) 528-2003
Attorney for South Central Bell
Telephone Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Motion for Summary Judgment has been forwarded to counsel for the plaintiff by depositing same in the U.S. Mail, postage prepaid, this 7th day of May, 1986.

/s/ Nancy B. White

Nancy B. White

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DOLORES B. CALLAHAN wife of/and GERARD CALLAHAN	*	CIVIL ACTION
	*	No. 86-0453
VERSUS	*	
	*	SECTION H
SOUTH CENTRAL BELL TELEPHONE COMPANY, BELL SYSTEM SAVINGS AND SECURITY PLAN and BANKERS TRUST COMPANY	*	Mag. 1

* *

MEMORANDUM IN SUPPORT OF DEFENDANT, SOUTH CENTRAL BELL TELEPHONE COMPANY'S MOTION FOR SUMMARY JUDGEMENT

I. *INTRODUCTION:*

This action was filed by Deloris Callahan, wife of/and Gerard Callahan, against South Central Bell Telephone Company (hereinafter "Bell") to recover sickness disability benefits allegedly due for a period of one (1) week commencing on March 27, 1985, end ending onn April 1, 1985, when Bell refused payment of such benefits (Petition, paragraph II). Additionally, the plaintiff averred that Bell's Employees' Benefit Claim Review Committee acted arbritrarily and capiciously in denying such benefits (Petition, Paragraph III). Bell now moves for summary judgment because the administrative record demonstrates that the administrative process, culminating in the denial of plaintiff's claim for sickness disability benefits by Bell's Employees' Benefit Claim Review Committee, was not arbitrary or capricious. As such, defendant is entitled to judgment as a matter of law.

II. *UNDISPUTED MATERIAL FACTS:*

Bell has established and administers a plan for employees' sickness and accident disability benefits (hereinafter the "Plan").[1]

The Plan was established "to provide for the payment of definite amounts to its employees when they are disabled by . . . sickness" (Plan, Exhibit "A", Section 1 at pg. 1). The Plan is the only vehicle through which a Bell employee can recover disability benefits (Affidavit of Floyd W. Smith, Exhibit "B").[2]

The Plan is administrated and maintained pursuant to ERISA. ERISA plans are defined as "any plan . . . established or maintained by an employer . . . for the purpose of providing for its participants or beneficiaries, through the purchase of insurance or otherwise . . . benefits in the event of sickness, accident, disability . . . ." *See* 29 U.S.C. Section 1002(1). The Plan's provisions recognize that it is governed by the ERISA statute: "The word 'ERISA' shall mean the Employment Retirement Income Security Act of 1974 . . . ." (Plan, Exhibit "A", Section 2.8 at pg. 3). The provisions of the Plan further provides that any participant whose claim for benefits has been denied shall have . . . rights of review as are provided in Section 503 of ERISA . . . ." (Plan, Exhibit "A", Section 3, paragraph 3(d) at pg. 8).

Further, 29 U.S.C. Section 1003, provides that ERISA is applicable to any employee benefit plan

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[1] A copy of the Plan is attached as Exhibit A to this Motion.

[2] The Collective Bargaining Agreement between South Central Bell and the Communications Workers of America, provides that during the term of that agreement, no changes will be in the terms of the Plan (Affidavit of Floyd W. Smith, Exhibit "B").

maintained by an employer engaged in or affecting interstate commerce. As the affidavit of Floyd W. Smith demonstrates operated a business engaged in or affecting interstate commerce. Thus, it is undisputed that the Plan from which plaintiff seeks to recover disability benefits is an ERISA plan and the Plan is covered by ERISA law.

Section 503 of ERISA, 29 U.S.C. Section 1133, requires such employee benefit plan to establish a two-step claims process. First, the Plan must provide adequate notice in writing to any participant whose claim has been denied, setting forth the specific reasons for such denial. Second, the Plan must afford a participant a full and fair review by the fudiciary of any adverse decision.

Under Bell's Plan and pursuant to Sections 503 of ERISA, the Employees' Benefit Committee (hereinafter "Committee") administers the Plan and has the power to grant or deny benefits under the Plan. (Plan, Exhibit "A", Section 3.1 at pg. 6; Section 3.2(e) at pg. 7). If the Committee denies the claim, the Committee must provide written notice of its decision to the claimant and allow an appeal of its decision to the Employees' Benefit Claim Review Committee (hereinafter "Review Committee"). (Plan, Exhibit "A", Section 3.3 (a), (b) at pg. 7). The Review Committee determines conclusively for all parties all questions arising in the administration of the Plan. (Plan, Exhibit "A" Section 3.4, at pg. 8-9). Participants are qualified to receive disability payments "on account of physical disability to work by reason of sickness." (Plan, Exhibit "A", Section 4.1, at pg. 10).

On April 12, 1984, Mrs. Callahan reported out from work with a condition she described as back problems. She submitted a certificate (Exhibit C-1) from Dr. Jack L. Winters, an orthopaedic surgeon, dated April 24, 1984, which reported a diagnosis of adhesive capsulitis of

shoulder, trochanteric tendonitis, and bulging lumbar disc. The doctor stated the back injury was aggravated by an injury at work on June 29, 1983 and further stated that Mrs. Callahan would have a chymopapain injection on May 5, 1984.

Mrs. Callahan's absence was treated as a sickness disability under the Plan (Plan, Exhibit A, Section 4.1, at pg. 10) due to the fact that she'd had back problems prior to the June 29, 1983 on-the-job accident. (Exhibit D, Affidavit of Enola Fee). In addition, back surgery had been indicated prior to the June, 1983 accident. Thus, her absence as of April 12, 1984 was not regarded as a disability arising solely from an accidental injury arising out of and in the course of employment so as to qualify for accident disability benefits under the Plan (Plan, Exhibit A, Section 5.1, pg. 14 and 5.5 at pgs. 18-19; Exhibit D, Affidavit of Enola Fee). Mrs. Callahan was notified by the Medical Benefit Reviewer on May 2, 1984, that her absence was being treated as sickness disability (Exhibit F, Affidavit of Debra Heilman).

Mrs. Callahan began receiving weekly sickness disability benefits on April 19, 1984, the eighth day of her absence from work as per the Plan (Plan, Exhibit A, Section 4.3 at pg. 12). She was eligible for 52 weeks of benefits less any weeks of sickness disability benefits from a previous sickness benefit absence, occurring within the past 13 weeks (Plan, Exhibit A, Section 4.4 at pg. 12). Mrs. Callahan had returned to work on February 2, 1984, from a previous sickness benefit absence during which she was paid sickness benefits for 2 weeks and 2 days (Exhibit F. Affidavit of Debra Heilman). Thus, in the instant matter, she was entitled to a possible 48 weeks and 3 days of sickness benefits resulting in a benefit expiration date of April 1, 1985, unless she returned to work before that date. (Exhibit F, Affidavit of Debra Heilman).

On May 1, 1984, Mrs. Callahan was still out from work and was seen by Dr. Winters (Exhibit C-2). Dr. Winters reported that Mrs. Calahan was being admitted to West Jefferson Hospital for the purpose of undergoing a chymopapain injection into the loser lumbar discs (Exhibit C-2). He further remarked that her condition was related to the June 29, 1983, incident at work, following which she developed pain in the legs and low back area (Exhibit C-2). On May 4, 1984, Dr. Winters admitted Mrs. Callahan to the hospital, performed the chymopapain injection, and estimated that she would be able to return to limited duty in four months (Exhibit C-3).

Mrs. Callahan submitted a physician's certificate from Winters, dated May 28, 1984, which stated that her prognosis was fair (Exhibit C-4). Mrs. Callahan submitted a certificate from Dr. Winters dated June 19, 1984 in which he estimated her return to limited duty in three months (Exhibit C-5). On July 16, 1984, Assistant Manager Virginia Roper made a home visit to Mrs. Callahan (Exhibit C-6). Mrs. Callahan told her that she was still having some problems and could not lift anything heavy, although she could do light cooking. Mrs. Callahan submitted a certificate from Dr. Winters, dated July 24, 1984, in which he estimated her return to limited duty in three months (Exhibit C-7). Mrs. Callahan submitted a similar certificate dated August 24, 1984 with the three month return to work estimation (Exhibit C-8). Another certificate dated September 25, 1984, from Dr. Winters gave no new information nor an estimated return to work date (Exhibit C-9).

On October 12, 1984, Dr. T. J. Borgman, Louisiana State Medical Consultant for Bell wrote Dr. Winters requesting additional information (Exhibit C-10). Dr. Winters replied on October 17, 1984 (Exhibit C-11), and enclosed the discharge summary from the May 4, 1984 hospitalization (Exhibit C-12). Dr. Winters stated that

Mrs. Callahan's back had improved a bit but that her prognosis was not good and she continued to have back as well as bilateral leg pain (Exhibit C-11). The West Jefferson Hospital discharge summary for the hospitalization of Mrs. Callahan on May 3, 1984 recorded a final diagnosis of (1) herniated lumbar intervertebral disc, L4-5; and (2) chronic calcific tendonitis with bursitis, left hip (Exhibit C-12).

A certificate submitted by Mrs. Callahan from Dr. Winters dated October 23, 1984, failed to report an estimated return to work date and gave no new information (Exhibit C-13). Two supervisory home visits were attempted by Ms. Roper on November 6, 1984, however, no one was at home (Exhibit C-14). On November 19, 1984, Ms. Roper made a home visit to Mrs. Callahan and reported that Mrs. Callahan complained of severe back pain and could not lift her left arm (Exhibit C-15). Ms. Roper observed no problem with walking by Mrs. Callahan when the latter rose on three occasions to answer the telephone (Exhibit C-15). On December 9, 1984, Mrs. Callahan was admitted to West Jefferson General Hospital for purposes of manipulation of the left shoulder (Exhibit C-16). She was discharged from the hospital on December 12, 1984 with a final diagnosis of adhesive capsulitis of the left shoulder; degenerative lumbar intervertebral disc disease, L3, L4 and L5; post injection herniated lumbar intervertebral disc, L4/L5; intervertebral osteoarthritis; and treochanteric bursitis with calcification and spur formation.

Dr. Winters, in a letter dated January 4, 1985, reported that Mrs. Callahan suffered from extensive degenerative intervertebral disc disease involving the lower three lunbar discs for which she had a chymopapain injection (Exhibit C-17). She also had bilateral hip bursitis

with a large calcific spur involving the trochanteric of the left hip. He further confirmed that she had been recently admitted to West Jefferson General Hospital where manipulation was performed to a frozen shoulder caused by an adhesive capsulitis. Dr. Winters reported that while Mrs. Callahan was slowly recovering from that condition, her degererative intervertebral disc disease and bursitis remained unchanged. Further, Mrs. Callahan had some degree of osteoarthritis. In Dr. Winters' opinion, she was unable to work at that time.

On January 16, 1985, Mrs. Callahan was examined by Dr. A. N. Diodene, Jr., an orthopaedic surgeon, at Bell's request (Exhibit C-18). In a letter dated January 18, 1985, Dr. Diodene reported that Mrs. Callahan had sustained a fall in 1981, resulting in pain radiating into the lower extremity. He further reported that she continued to suffer with back pain until the present and recounted the work injury of July, 1983. Dr. Diodene also reported all the other significant particulars of Mrs. Callahan's past medical history. He described his physical examination of Mrs. Callahan and stated that his examination of the lower extremities revealed no evidence of motor, reflex or sensory abnormalities. He further stated, however, that he could not complete his evaluation of her without review of the x-rays taken by Dr. Winters since Mrs. Callahan requested that no additional x-rays be taken.

Mrs. Callahan submitted a certificate from Dr. Henry White dated February 25, 1985 in which he diagnosed her as suffering from a hiatal bernia with reflux esophagitis and proctitis with bleeding (Exhibit C-19). He reported that it was of recent onset. Dr. White further advised that Mrs. Callahan would require long term medication, a special diet, and should not lift or bend.

Mrs. Callahan submitted a certificate from Dr. Winters dated March 11, 1985, in which he reported that she had a degenerative lumbar disc and persistent L5 radiculopathy (Exhibit C-20). Dr. Winters stated that Mrs. Callahan probably could not return to work as a steno clerk.

On March 12, 1985, Mrs. Callahan submitted a certificate and letter from Dr. C. J. Haindel, a family practitioner, containing a diagnosis of Meniure's Disease (Exhibit C-21). Dr. Haindel reported that he had been treating Mrs. Callahan for dizziness, a decrease in hearing, and tinnitis. He stated that her symptoms were usually controlled with diuretics, vasodilators, and antinausea pills. There was decreased hearing in the left ear, all of which accounted for the diagnosis of Meniere's Disease. He added that he cautioned Mrs. Callahan to be careful in driving and climbing.

On March 19, 1985, Dr. Borgman, Bell's Louisiana Medical Consultant, spoke with Dr. Diodene who had by this time received Mrs. Callahan's x-rays from Dr. Winters (Exhibit C-22). Dr. Diodene told Dr. Borgman that Mrs. Callahan could return to a sedentary work position at that time. This was confirmed by a letter from Dr. Diodene, dated March 25, 1985 (Exhibit C-23), in which he stated that, based upon his physical examination of Mrs. Callahan and a review of the x-rays of her shoulder and lumbar spine, he saw no reason why she could not perform a sedentary form of work as per her job description (Exhibit D, Affidavit of Enola M. Fee).

In his March 19, 1985 review of the case (Exhibit C-22), Dr. Borgman felt that it was important to have the issue of Mrs. Callahan's Meniere's Disease clarified by an examination by Dr. R. A. Spector. Dr. Spector, an otolaryngologist, examined Mrs. Callahan on March 25,

1985 (Exhibit C-24). In his letter, Dr. Spector recounted the significant particulars of Mrs. Callahan's past medical history obtained both from Mrs. Callahan and the written medical reports. Dr. Spector reported that, based on his physical examination and Mrs. Callahan's ability to shop and drive her own car, he saw no reason why she could not return to work as a stenographer as per her job description (Exhibit D, Affidavit of Enola M. Fee). Dr. Spector made it clear that the diagnosis of Meniere's Disease might cause Mrs. Callahan recurring episodes of unsteadiness which might leave her reasonaable incapacitated for periods of up to approximately two weeks (Exhibit C-24). He further stated, however, that the periods in between these episodes would not prevent her from carrying on her job description. Dr. Spector advised Mrs. Callahan to be active in order to assist in lessening the symptoms.

The Medical/Benefit Reviewer advised Mrs. Callahan on March 26, 1985 that she was expected to return to work on March 27, 1984 (Exhibit F, Affidavit of Debra Heilman). She was further told that sickness disability benefits would not be paid beyond March 26, 1985 due to the fact that both Dr. Spector and Dr. Diodene found Mrs. Callahan able to return to work at her sedentary clerical position. Mrs. Callahan was notified in writing of this action by notice dated March 27, 1985 (Exhibit C-25). On March 29, 1985, Dr. Borgman reviewed the case and agreed Dr. Spector's report could be sent to Mrs. Callahan's doctor (Exhibit C-26). On April 4, 1985, the State Assistant Secretary recommended that sickness disability benefits be denied to Mrs. Callahan for her absence from work beginning March 27, 1985. On that same date, Mrs. Callahan was notified by letter that her claim for sickness disability benefits had been referred to the Employees' Benefit Committee for its determination (Exhibit C-27).

On April 2, 1985, Mr. John F. Tooley, Jr., Mrs.

Callahan's attorney, wrote to the Secretary of the Employees' Benefit Committee (hereinafter "Committee") requesting Plan documents and stating that Dr. Winters and Dr. Rozas felt Mrs. Callahan could not return to work (Exhibit C-28). Mr. Tooley added that he was requesting written reports which would be forwarded. The Secretary of the Committee acknowledged Mr. Tooley's request in a letter dated April 11, 1985 (Exhibit C-29). He advised that since additional medical information was to be forthcoming, action on Mrs. Callahan's claim would be deferred until the Committee's May 15, 1985 meeting instead of the scheduled April 18, 1985 meeting (Exhibit C-29). The Secretary stated that additional information should be furnished no later than May 10, 1985 (Exhibit C-29).

Sickness disability benefits for Mrs. Callahan's absence from March 27, 1985, were denied by the Committee at its May 15, 1985, meeting (Exhibit C-30). The Committee found that the absence was not covered by the Plan because the medical evidence submitted did not describe an injury severe enough to substantiate benefit payment for the period in question. This decision was based upon examinations by Drs. Diodene and Spector who concluded that Mrs. Callahan could work in a sedentary position. Mrs. Callahan's job as a stenographer was one for which she was physically suited (Affidavit of Enola Fee, Manager-Legal Compliance, Exhibit D). Further, the committee noted that Mrs. Callahan was not restricted in her personal life from such normal activities as shopping and driving (Exhibit C-30). Mrs. Callahan, through her attorney, John Tooley, Jr., was advised of her right to appeal this decision to the Employees' Benefit Review Committee (hereinafter "Review Committee") within sixty (60) days and of the procedure to follow if she wished to process such an appeal (Exhibit C-31). Mr. Tooley was further advised that "her appeal should include medical information about her need to be away from work during the above period"

(Exhibit C-31).

By letter of May 23, 1985, (Exhibit C-32), Mrs. Callahan, through her attorney, Mr. Tooley, requested an appeal of her claim for sickness disability benefits. Mr. Tooley submitted a letter from Dr. Earl J. Rozas, an orthopaedic surgeon, dated May 21, 1985, which described his evaluation of Mrs. Callahan on March 29, 1985 (Exhibit C-33). Dr. Rozas recounted a history of Mrs. Callahan's fall in a restaurant in 1981 and the fall at work in July of 1983. He reported that x-rays of the lumbar spine revealed arthritic spurs at L4 and L5 with normal appearing disc spaces. Dr. Rozas concurred with Dr. Winters' recommendation that Mrs. Callahan was unable to return to work.

Receipt of Mrs. Callahan's appeal was acknowledged by Jill Miller, Secretary, Review Committee, by letter of June 3, 1985 (Exhibit C-34). She further stated that a determination of the appeal would be made by June 30, 1985. On June 28, 1985, Ms. Miller advised Mr. Tooley that Mrs. Callahan's case had been set for determination on July 8, 1985 (Exhibit C-35). On June 4, 1985, and July 2, 1985, Mrs. Callahan's case was reviewed by Bell's orthopaedic consultant, Dr. Chesney L. Yelton (Exhibit C-36 and 37). He concurred with Dr. Diodene's and Dr. Spector's opinion that Mrs. Callahan was able to do sedentary work.

Mrs. Callahan's appeal was considered by the Review Committee in its meeting of July 11, 1985 (Exhibit E, Affidavit of Jill Miller; Exhibit C-38, Minutes of the July 11, 1985 meeting of the Review Commmittee). The Review Committee concluded that:

> "(W)hile Dr. Rozas' report of May 21,1985, indicated he concurred in Dr. Winters' recommendation of her inability to do any work duties; the objective findings described in his examination

did not, in the opinion of the Company's orfthopaedic consultant, support this conclusion. the objective findings did not establish a restriction severe enough to prevent an individual from performing the moderate duties of a stenographer; and Mrs. Callahan's known activities included shopping and driving which also indicated a level of ability compatible with the duties of a stenographer."

The Review Committee sustained the denial of sickness disability benefits for Mrs. Callahan's absence from March 27, 1985 through April 1, 1985 (Exhibit C-38, pg. 12). The minutes clearly demonstrate that the Review Committee's judgment was based upon the evalution of the two physicians, as well as Bell's medical consultant, who found plaintiff, based on the medical records, able to continue working in a sedentary position. The minutes of the meeting clearly indicate that the Review Committee considered the plaintiff's entire medical record. The Review Committee sustained the Benefit Committee's denial of benefits from absences occurring on or after March 27, 1985, because the medical evidence failed to establish a disability which would disqualify Mrs. Callahan from work in a sedentary position. Mrs. Callahan was notified by Ms. Miller of the Review Committee's decision by letter (Exhibit E, Affidavit of Jill Miller).

In a letter dated July 11, 1985 (Exhibit C-39), Mr. Tooley submitted a narrative report dated July 8, 1985, from Dr. Winters (Exhibit C-40). Due to the fact that the submission fell within Mrs. Callahan's original sixty day appeal period, Ms. Miller notified Mr. Tooley that the case would be returned to the Review Committee for consideration of the additional evidence (Exhibit E, Affidavit of Jill Miller). In his narrative, Dr. Winters described the history of Mrs. Callahan's back and hip condition (Exhibit C-40),

which condition existed at his first examination on April 24, 1980. He reported that her symptoms were aggravated by prolonged sitting and standing. Dr. Winters further stated that she had attempted to return to work on several occasions after the May, 1984 chymopapain injection, which only increased the symptoms. Note, however, that at no time after the May, 1984 procedure had Mrs. Callahan attempted to return to work (Exhibit C *en globo*). Dr. Winters concluded that Mrs. Callahan's complaints of pain aggravated by working were real and were probably limiting her capacity for employment at that time (Exhibit C-40).

Ms. Miller notified Mr. Tooley that the Review Committee would consider Dr. Winters' report as additional evidence and reopen Mrs. Callahan's claim (Exhibit E, Affidavit of Jill Miller). On July 30, 1985, Dr. Yelton, Bell's orthopaedic consultant reviewed Dr. Winters' narrative, and concluded that it did not change his original opinion (Exhibit C-41) that the objective findings described on examination were not sufficient to prevent Mrs. Callahan to return to work as a stenographer (Exhibits C-36 and C-37).

The Review Committee reconsidered Mrs. Callahan's c;laim in its meeting of August 13, 1985 (Exhibit E, Affidavit of Jill Miller). The Review committee re-sustained the denial of sickness benefits for Mrs. Callahan's absence from March 27, 1985 through April 11, 1985 and notified Mrs. Callahan, through Mr. Tooley, in a letter dated August 26, 1985 (Exhibits C-42 and C-43). The Review Committee's judgment was again based upon the evaluation of the two physicians, as well as Bell's medical consultant, who found Mrs. Callahan, based on the medical records, able to continue working in a sedentary position. While the Review Committee considered the plaintiff's entire medical record, it sustained its finding of July 11, 1985, denying benefits for absence on or after March 27, 1985

(Exhibit C-42). The Review Committee found that the medical evidence failed to establish a disability which could disqualify Mrs. Callahan from work in a sedentary position (Exhibit C-42).

Thus, Mrs. Callahan's absence did not qualify for sickness benefits under the Plan, which limits such payments to a physical disability to work by reason of sickness (Plan, Exhibit A, Section 4.1). Mrs. Callahan was informed of the Review Committee's decision by letter to Mr. Tooley dated August 26, 1985 (Exhibit C-43).

III. THE ADMINISTRATIVE PROCESS, CULMINATING IN THE DENIAL OF PLAINTIFF'S CLAIM BY THE REVIEW COMMITTEE WAS NOT ARBITRARY OR CAPRICIOUS AND WAS BASED UPON THE EVIDENCE

Pursuant to 29 U.S.C. Section 1132(a) (1) (B), plaintiff may bring suit for ERISA disability benefits. To recover such benefits plaintiff must prove not only that she was disabled from work by sickness, as required in Section 4.1 of the Plan, but also that the denial of benefits was arbitrary or capricious.

In civil actions challenging decisions of the pension plan trustees, the Fifth Circuit has consistently held that "actions of the trustees in the administration of the pension plan must be sustained as a matter of law unless plaintiff can prove such activities have been arbitrary or capricious." *Bayles v. Central States, Southeast and Southwest Areas Pension Fund*, 602 F. 2d 97, 99 (5th Cir. 1979). The *Bayles* court further stated:

> "To protect the rights of pensioners, courts have found it necessary to subject the conduct of

> pension plan trustees to judicial review and correction. However, where fiduciaries are granted broad discretion, as is generally the case with the trustees of pension trusts, courts generally limit their review and intervene in the fiduciaries' decisions only where 'they have acted arbitrarily or capricioulsy towards one of the persons to whom their trusts obligations run. We find this standard of judicial review, which leads neither to abdication of traditional judicial control of fiduciaries nor to excessive judicial intervention in trust operations, in harmony with federal labor policy.'"

602 F. 2d at 100 (Citations omitted). *See also Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.*, 637 F. 2d 357, 362 (5th Cir. 1981); *cert. denied*, 454 U.S. 836 (1981). In *Miley v. Crown Zellerbach Corporation Pension Plan*, 716 F. 2d 900 (5th Cir. 1983), the Fifth Circuit affirmed the decision of Judge Sear, granting summary judgment to the defendant plan, where the Court found after review of the administrative record, the denial of benefits to the plantiff was not arbitrary or capricious. (Exhibit G, attached hereto). This standard of review is in accordance with other circuits. *E.g., Palino v. Casey*, 664 F. 2d 854, 858 (1st Cir. 1981); *Gehrhardt v. General Motors Corp.*, 581 F.2d 7, 11 (2d Cir. 1978); *Adams v. New Jersey Brewery Employees' Pension Fund, Local Union 843*, 670 F. 2d 387, 397-398 (3d Cir. 1982); *Seafarere Pension Plan v. Sturgis*, 630 F. 2d 218, 221 (4th Cir. 1980); *Wardle v. Central States, Southeast and Southwest Areas Pension Fund*, 627 F. 2d 820, 823-24 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *Miller v. Associated Pension Trusts, Inc.*, 541 F. 2d 726, 728-29 (8th Cir. 1976); *Miranda v. Audia*, 681 F. 2d 1124, 1125 (9th Cir. 1982).

The arbitrary or capricious standard of review, applicable in the instant case, reflects judicial recognition

that "the trustees of covered benefit plans are granted broad fudiciary rights and responsibilities uner ERISA, Sections 401-414, 29 U.S.C. Sections 1101-1114 . . . . " *Amato v. Bernard*, 618 F. 2d 559, 567 (9th Cir. 1980). In carrying out their broad fiduciary responsibilities, the Trustees attempt to protect the interest of *all* benefit plan participants, rather than affording any *individual* participant special treatment. Courts have recognized that by applying an arbitrary or capricious standard of judicial review, plan trustees are given the necessary latitude to perform their difficult function. As the First Circuit Court of Appeals commented:

> We begin our task with the recognition, shared by the parties, that unless the trustees' interpretation of the plan is arbitrary and capricious, or without rational basis, it may not be disregarded. We also must realize that *we review for arbitrariness in the light of the trustees' responsibility to all potential beneficiaries.* this duty in the large, the necessity to draw hard boundary lines, inevitable adversely affects some individuals who find themselves on the wrong side of a line.

Rueda v. Seafarers International Union of North America, 576 F. 2d 939, 942 (1st Cir. 1978) (citations omitted) (emphasis added).

Thus, the scope of judicial review in the instant claim for sickness disability benefits is limited to determining whether the Committee and Review Committee acted arbitrarily or capriciously in denying benefits. Also, in deciding whether the denial of benefits was arbitrary or capricious, plaintiff is not entitled to a trial *de novo* before this Honorable Court. Instead, the Court's review is limited to the record developed during the administrative process below. *Miley v. Crown Zellerback Corporation*

Pension Plan, supra; Wardle v. Central States, Southeast and Southwest Areas Pension Fund, 627 F. 2d 820, 824 (7th Cir. 1980); *Hicks v. Pacific Maritime Association*, 567 F. 2d 355, 358 (9th Cir. 1978).

Further, the Court's review of the trustees' decision cannot focus on whether the decision to deny benefits was right or wrong. Instead the Court's review is limited to whether the trustees made a rational decision based upon the evidence presented to the trustees. *See Torimino v. United Food and Commercial Workers Pension Fund*, 712 F. 2d 882 (8th Cir. 1983) (although record contained conflicting medical evidence trustees denial of benefits sustained); *Martinez v. Swift & Co.*, 656 F. 2d 262, (7th Cir. 1981) (evidence rationally supported trustees' decision); *Rueda v. Seafarers International Union of North America*, 576 F. 2d 939, 943 (1st Cir. 1978) (trustsees' approach must only be a rational one and not necessarily the best); *Riley v. MEBA Pension Trust*, 570 F. 2d 406, 410 (2d Cir. 1977) (judicial role limited to determining whether the trustees' interpretation was made rationally and in good faith -- not whether it was right); *Marsh v. Greyhound Lines, Inc.*, 488 F. 2d 278, 280 (5th Cir. 1974) (decision of trustees to be upheld if supported by reasonable basis in fact) (quoting *Boeing Co. v. Shipman*, 411 F. 2d 365, 374 (5th Cir. 1974); *Seneff v. Central States, Southeast and Southwest Areas Pension Fund*, No. C82-2493 (N.D. Ohio, 1983) (trustees determination must be upheld if reasonable even though decision was wrong). The Second Circuit in *Gehrhadt v. General Motors Corp.*, 581 F. 2d 7 (2d Cir. 1978) described the court's role on review as follows:

> It is not enough to persuade a judge or jury that the trustees' decision may have been incorrect. If the trustees' decision is supported by a reasonable basis "*the court may not substitute its judgment for that of the trustees* . . . on the

> disputed factual issues," . . . . *The test, therefore, is not what the court would have done under the circumstances but whether, viewing the evidence mosts favorably to appellant, it can be concluded that no reasonable basis existed for the trustees' decision.*

581 F. 2d at 11 (citations omitted) (emphasis added). Reliance on the opinion of an administrator's medical advisor is not an arbitrary or capricious act. *Bickel v. Long Term Disability Plan of Western Electric,* 541 F. Supp. 685 (E.D. Pa. 1982).

Applying the applicable legal standards to the undisputed material facts in the instant case, it is clear that defendant's Review Committee did not act arbitrarily or dapriciously and the denial of plaintiff's claim for benefits for absences occurring on or after March 27, 1985 was reasonaable, based on the evidence before it. As set forth in the affidavits stated plaintiff, a bus driver, should drive neither buses or commercial trucks; another report failed to state plaintiff could not drive buses; and the third concluded plaintiff was normal. 488 F. 2d at 279, 282. the Fifth Circuit referred to the conflicting medical reports and upheld the trustees' decision because the administrative record established a basis in fact for the decision. 488 F. 2d at 283. thus the Court, relying on the *Boeing v. Shipman* standard, upheld the trustees' decision.

Similarly, the record in the instant case supports the final decision of the Review Committee. Based on the medical evidence and the entire administrative record, the Review Committee concluded plaintiff was not unable to work by reason of accidental injury. Accordingly, under Section 4.1 of the Plan, plaintiff was not entitled to benefits under the Plan. The decision to deny benefits was not arbitrary or capricious because reasonable men cannot

conclude that the trustees' decision had no basis in fact. *Marsh, supra,* 488 F. 2d at 823.

IV. CONCLUSION

In light of the above and foregoing reasons, it is respectfuly submitted that this Court should enter judgment granting defendant's Motion for Summary Judgment relative to plaintiff's claim for sickness disability benefits for a period of one week, commencing on March 27, 1985, and award defendant's its costs and reasonable attorney's fees pursuant to 29 U.S.C. Section 1132(g) (i).

Respectfully submitted,

/s/Nancy B. White

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Telephone Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Memorandum in Support of the Motion for Summary Judgment has been forwarded to counsel for the plaintiff by depositing same in the U. S. Mail, postage prepaid, this 7th day of May, 1986.

/s/Nancy B White

Nancy B. White

APPENDIX G

Review Committee Minutes **August 13, 1985**
Series 10, No. 7 **Attachment 1**
Sheet 1

Sickness Disability Benefits

Mrs. Dolores B. Callahan
Stenographer
Business Marketing
Gretna, Louisiana
Age: 51 years 6 months
Service: 25 years 6 months

First day absent: 4-12-84
Benefits expired: 4-1-85
Has not returned

To be considered

Payment of sickness disability benefits for Mrs. Callahan's absence from March 27, 1985 through April 1, 1985.

Synopsis and claim

Mrs. Callahan reported out on April 12, 1984 and underwent a chymopapain injection for a bulging lumbar disc on May 4, 1984. Her recovery from this procedure was prolonged beyond the usual four-to six-week period in that she continued to complain of pain. On December 10, 1984, she underwent manipulation of a frozen shoulder under anesthesia.

At South Central's request, Mrs. Callahan was examined by Orthopedic Surgeon Dr. A. N. Diodene on January 16, 1985. He delayed giving an opinion until he was able to review X-rays made by Dr. Jack Winters. Upon his review of the X-rays, he reported on March 25, 1985 that he felt Mrs. Callahan was able to return to her sedentary job.

Mrs. Callahan submitted a certificate showing that she suffered from hiatal hernia, reflus esophagitis, proctitis with bleeding and Meniere's syndrome. Her personal orthopedist, Dr. Winters, advised that he felt Mrs. Callahan probably could not return to work as a steno clerk because of degenerate lumbar disc and persistent radiculopathy.

Because of the diagnosis of Meniere's syndrome, South Central had Mrs. Callahan examined by Dr. R. A. Spector, an otolaryngologist, on March 25, 1985. He wrote:

Synopsis and claim

> "With the extent of this lady's ability to shop and drive her own car, I see no contraindication to her returning to work as a stenographer. It should be understood that the diagnosis of Meniere's may cause her recurring episodes of unsteadiness that may be quite severe, and may leave her incapacitated for periods up to approximately two weeks. However, periods in between these acute episodes, although they may be uncomfortable for her, should not preclude her carrying on her job description more times than not....I have advised the patient that the more active she is, the less she is apt to have persistent vertigo or imbalance...."

Benefits were suspended March 27, 1985 based on evaluations of Dr. Diodene and Dr. Spector. Mrs. Gallahan did not return to work. On April 10, 1985, Attorney John F. Tooley, Jr. wrote to the Secretary of the Employees' Benefit Committee. He requested plan documents and stated:

> "Mrs. Callahan is in constant pain and obviously disabled. Both Dr. Winters and Dr. Rozas so

state her benefits should be continued." (No reports from Dr. Rozas were in the record.)

The State Assistant Secretary recommended that benefits be denied for Mrs. Callahan's absence beginning March 27, 1985.

On or about April 15, 1985, Mrs. Callahan filed a workers' compensation claim, alleging that her disability beginning April 12, 1984 resulted from accidential injury arising out of and in the course of employment. This claim is presently under investigation.

Administrative Information

4-12-84 Mrs. Callahan reported out for a reason she stated as "back problems".

4-19-84 Eighth day of absence. Benefits authorized.

Medical Documentation

4-24-84 Physician's Certificate, Dr. Jack L. Winters, orthopedic surgeon. Dx: adhesive capsulitis of shoulder, trochanteric tendinitis, bulging lumbar disc. Onset 1984. Back injury aggravated by injury at work on June 29, "Patient will have chymopapain injection May 5, 1984."

Administrative Information

5-2-84 Mrs. Calahan entered the hospital for tests prior to chymopapain injection. She called the Medical Benefit Reviewer and told her Dr. Winters said that her problem was a recurrence of an on job injury (6-29-83). Mrs. Callahan wanted to know how her absence was handled and what was the difference (between sickness and

Administrative Information

accident disability). The MBR discussed the case with Enola Fee, the manager-Legal Compliance. The June 29, 1983 injury was documented in the record. However, Mrs. Callahan had a back problem prior to that accident and surgery had been indicated prior to the accident. Thus, the present absence was not regarded as disability resulting solely in the course of employment. The MBR notified Mrs. Callahan that her absence would be treated as sickness disability, and that she should file her medical bills under the Medical Expense Plan.

Medical Documentation

5-3-84 Letter by Dr. Winters: "She had a past history of pericarditis and has been directed to the office of Henry White for dedical consultation prior to admission to the hospital (for chymopapain injection). I think this condition is almost certainly related to her twisting injury at work following which she subsequently developed pain involving the low back area and legs. . . ."

Administrative Information

5-4-84 Dr. Winters performed the chymopapain injection.

Medical Documentation

5-4-84 Physician's Certificate, Dr. Winters. Mrs. Callahan was admitted to the hospital 5-4-84. Estimated return to limited duty "4 months."

5-28-84 Physician's Certificate, Dr. Winters. Prognosis fair.

Administrative Information

5-31-84 At the end of the usual four week recovery period for successful chymopapain. injections, the MBR called Mrs. Callahan. She told the MBR she was feeling somewhat improved, but Dr. Winters had not yet released her.

6-15-84 Mrs. Callahan called the MBR and told her the next appointment with Dr. Winters was for June 28, 1984.

Medicxal Documentation

6-19-84 Physician's Certificate, Dr. Winters. Estimated return to limited duty three months.

Administrative Information

7-16-84 Supervisor Virginia Roper made a home visit. Mrs. Callahan told her she was still having some problems. She could not lift anything heavy. She could do light cooking but not lift heavy pots. The Supervisor observed pillows propped on the sofa as if Mrs. Callahan had been resting there.

Medical Documentation

7-24-84 Physician's Certificate, Dr. Winters. Estimated return to limited duty three months.

8-24-84 Physician's Certificate, Dr. Winters. Estimated return to limited duty three months.

9-25-84 Physician's Certificate, Dr. Winters. An estimated return to work date was not given nor was any other new information.

Medical Documentation

10-12-84 Dr. T.J. Borgman, State Medical Consultant, wrote Dr. Winters requesting additional information.

10-17-84 Letter by Dr. Winters in response to Dr. Borgman's request: "Enclosed find a discharge summary relating to Mrs. Callahan's last hospital admission. I think her back has been improved a bit by her most recent treatment but her prognosis is not good and she continues to have back as well as bilateral leg pain." The discharge summary for Mrs. Callahan's hospitalization on May 3, 1984 recorded a final diagnosis of (1) Herniated lumber intervertebral disc, L4-5, and (2) Chronic calcific tendonitis with bursitis, left hip.

10-23-84 Physician's Certificate, Dr. Winters again failed to report an estimated return to work date.

Administrative Information

11-6-84 Two supervisory home visits were attempted at Mrs. Callahan's residence at 11:15 and 12:20. No one was at home.

11-19-85 Supervisor Roper made a home visit. She reported that Mrs. Callahan complained of severe back pain, said she could not lift left arm. Her general appearance was good. Mrs. Callahan had been sitting on sofa propped on a pillow, with heating pad nearby. When she arose on three occasions to answer the telephone, the Supervisor observed no problem with walking.

Administrative Information

12-3-84 Mrs. Callahan advised the MBR that she was scheduled to go into the hospital for surgery to manipulate the shoulder. However, she had the flu and was to see her regular medical doctor today.

12-10-84Mrs. Callahan had manipulation of shoulder under anesthesia.

12-12-84She was released from the hospital.

1-2-85 The Departmental Manager Pete Evans and Supervisor Carol LaGrange called the MBR. Ms. LaGrange told the MBR that she customarily passes Mrs. Callahan's house on the way home from work each day. She had observed Mrs. Callahan getting out of her car carrying a Department Store bag; she did not appear to have any problem.

Ms. LaGrange submitted a written statement confirming her observations which she stated occurred in November, 1984. She wrote that on two occasions in November she had observed Mrs. Callahan alighting from her automobile in front of her home. On each occasion she carried bags as if she had been shopping, and was accompanied by her three-to-four year old granddaughter and by another child age nine or ten.

Medical Documentation

1-4-85 Letter by Dr. Winters: "(Mrs. Callahan) suffers from degererative intervertebral disc disease which is extensive and involves the ower three lumbar discs for which she has had a chymopapain injection. Moreover, she has bilateral hip bursitis with a large calcific spur involving the trochanteric of the left hip. She was most recently admitted to the West Jefferson General Hospital where manipulation was accomplished for the treatment of a frozen shoulder caused by an adhesive capsulitis. She is slowly recovering from that condition. Her degerative intervertebral disc disease and calcific bursitis remain unchanged. She has some degree of generalized osteoarthritis and in my considered opinion the patiest is currently not now able to be employed."

Administrative Information

1-11-85 The MBR notified Mrs. Callahan that arrangements had been made for he examination by Dr. Diodene

1-16-85 Dr. Diodene advised the MBR that he wished to review X-ray film of Mrs. Callahan's back before giving his opinion. He had asked Mrs. Callahan to obtain the film.

1-17-85 Dr. Diodend mailed a request for X-rays to Dr. Winter.

Medical Documentation

1-18-85 Letter by Dr. Diodene describing his examination of Mr.s Callahan on January 16, 1985. He stated that he needed to review Dr. Jack Winter's X-rays, since Mrs. Callahan requested no additional X-rays be made, and would complete his evaluation and render an opinion when the X-rays were available.

Administrative information

1-25-85 Dr. Winters furnished information to Dr. Diodene, but did not furnish X-rays as requested.

1-28-85 Mrs. Callahan advised the MBR that she had signed a release authorizing Dr. Winters to release the X-rays. The MBR requested that she contact Dr. Winters' office and request that the X-rays be provided. She agreed to do so.

1-31-85 Mrs. Callahan advised the MBR that Dr. Winters' office staff told her the X-rays were not yet available. They would be mailed as soon as possible.

2-6-85 Dr. Diodene's office advised the MBR that the X-rays had still not been received.

2-11-85 Dr. Diodene's office received the X-rays.

2-25-85 Physician's Certificate, Dr. Henry White. Dx: Hiatal hernia with reflux esophagitis; proctitis with bleeding. Onset recent. "Patient will require medication long term, should not lift or bend. Special diet."

Medical Documentation

3-11-85 Physician's Certificate, Dr. Winters. "Pt. has degenerative lumbar disc and persistent L5 radiculopathy. She probably cannot return to work as a steno clerk."

3-12-85 Physician's Certificate, Dr. C. J. Haindel. Dx: Meniere's syndrome. Letter by Dr. Haindel, same date: "I have been treating (Mrs. Callahan) because of dizziness, decrease in hearing and tinnitis. Mrs. Callahan's symptoms are usually controlled with diuretic, vasodilators and antinausea pills. The ENT examination is normal except for decreased hearing in the left ear. Because of the history and physical examination and decreased hearing in the left ear, a diagnosis of Menierre's Disease has been made. . . .This patient has been treated in this office approximately four times a year. I have cautioned the patient to be careful in driving a car or climbing a ladder and at times she must stay at home because of her dizziness."

3-19-85 Review by Dr. Borgman, State Medical Consultant: "Verbally Dr. Diodene indicates a willingness to state that this lady could return to a sedentary position at this time, from his point of view. That only leaves the Meniere's Disease. I think to clarify that issue it is going to be important to have lady examined by Dr. Richard Spector."

Medical Documentation

3-25-85 Letter by Dr. Diodene: "X-rays which were made of Mrs. Callahan's shoulder and lumbar spine areas on several different occasions at the Westside Orthopedic Clinic were reviewed in my office. X-rays of her left shoulder were entirely within normal limits as were those of her lumbar back region. Based upon her physical examination and X-rays, I see no reason why this individual could not perform a sedentary form of work."

Administrative Information

3-25-85 Dr. Spector examined Mrs. Callahan at South Central's request.

Medical Documentation

2-35-85 Letter by Dr. R. A. Spector, Otolaryngologist, dated the same date described his examination of Mrs. Callahan at South Central's request. He wrote in part: "With the extent of this lady's ability to shop and drive her own car, I see no contraindication to her returning to work as a stenographer. It should be understood that the diagnosis of Meniere's may cause her recurring episodes of unsteadiness that may be quite severe, and may leave her reasonably incapacitated for periods of up to approximately two weeks. However, periods in between these acute apisodes, although they may be uncomfortable for her, should not preclude her carrying on her job description more times than not. In accordance with this recommendation, I

Medical Documentation

have advised the patient that the more active she is, the less she is apt to have persistent vertigo or imbalance, that she needs to recondition her proprioceptive mechanisms so that she is able to withstand the occasional inner disturbance. . . ."

Administrative Information

3-26-85 Dr. Spector advised the MBR by telephone that if employee can go grocery shopping pick out her groceries and not fall down in the store, then she can definitely return to work in a sedentary clerical position.

On the same day, the MBR notified Mrs. Callahan that both Dr. Spector and Dr. Diodene found her able to return to work at her sedentary clerical position. Benefits would not be paid beyond this date. Mrs. Callahan asked if she could submit a second opinion, and the MBR told her that any medical information she submitted would be connsidered by the Benefit Committee.

3-27-85 Benefits were suspended; the MBR notified Mrs. Callahan in writing of this action. Mrs. Callahan did not return to work.

Medical Documentation

3-29-85 Review by Dr. Borgman: "We can send the report (Dr. Spector's) to her doctor. I hope she elects to come back to work."

Administrative Information

4-4-85 The State Assistant Secretary recommendated that sickness disability benefits be denied to Mrs. Callahan for her absence from work beginning March 27, 1985.

4-16-85 The Manager-Legal Compliance notified the MBR that Mrs. Callahan had filed a workers compensation claim.

Action by the Employees' Benefit Committee

In its meeting of May 15, 1985, the Employees' Benefit Committee reviewed Mrs. Callahan's claim and denied sickness disability benefits for her absence from March 27 through April 1, 1985. The decision was based on examination by Dr. A. N. Diodene of January 11, 1985 which indicated that Mrs. Callahan was able to do sedentary work as far as her back condition was concerned, and an examination by Dr. R. A. Spector on March 25, 1985, which established that her Meniere's syndrone should not disable her from work as a stenographer. The Benefit Committee noted that Mrs. Callahan was not restricted in her personal life from such normal activities as shopping and driving. The application for benefits was denied under Section 4, Paragraph 1 of the Sickness & Accident Disability Benefit Plan which limits such payments to physical disability to work by reason of sickness.

Appeal

Attorney John F. Tooley, Jr. submitted an appeal on Mrs. Callahan's behalf on May 31, 1985.

With the appeal, Mr. Tooley submitted a letter from Dr. Earl Razas dated May 21, 1985. Dr. Razas recounted a history of Mrs. Callahan's having fallen in a restaurant in

1981, and having fallen at work in July 1983. Dr. Ragas wrote:

> "X-rays of the lumbar spine were taken which revealed arthritic spurs at L4 and L5 with normal appearing disc spaces. It is my opinion that on my only evaluation of Mrs. Callahan that she has sustained a back injury dating back to 1981 subsequently reinjuring herself in 1983 leading to a disc injection in May, 1984. She has continued to have problems regarding her back and is under the care of a very conpetent orthopedic surgeon, Dr. Jack Winters. I concur with his recommendation of her inability to do any work duties, and I would refer any future disposition on duties to Dr. Winters who is her treating physician."

Action by the Employees' Benefit Claim Review Committee - July 11, 1985

In its meeting of July 11, 1985, the Review Committee sustained the denial of the Employees' Benefit Committee based on its finding that additional medical information submitted with the appeal failed to establish that Mrs. Callahan was disabled for work as a stenographer for the period March 27 through April 1, 1985. While Dr. Ragas' report on May 21, 1985, indicated he occurred in Dr. Winters' recommendation of her inability to do any work duties," the objective findings described in his examination did not, in the opinion of the Company's orthopedic consultant, support this conclusion. The objective findings did not establish a restriction severe enough to prevent an individual from performing the modeate duties of a stenographer; and Mrs. Callahan's known activities included shopping and driving which also indicated a level of ability compatible with the duties of a stenographer. The Review Committee agreed that the application did not qualify under the terms of the Sickness & Accident

Disability Benefit Plan Section 4, Paragraph 1 in that physical disability to work by reason of sickness or injury was not established by the medical and other evidence.

Additional information

On July 15, 1985, Mr. Tooley Submitted a narrative report dated July 8, 1985, from Dr. Winters. Because this submission was made within Mrs. Callahan's sixty day appeal period, the Review Committee Secretary notified Mr. Tooley that the case would be returned to the review Committee for consideration of the additional evidence.

In his four page narrative, Dr. Winters described the history of Mrs. Callahan's back and hip condition. He wrote:

> "She subsequently (after her chymopapain injection) improved rather considerably although she continues to have back ache and symptoms relative to her trachonteric bursitis although her sciatic-like leg pain is very improved. Her symtoms are aggravated by prolonged sitting, etc. She has attempted to return to work on several occations with a corresponding considerable increase in her symptoms *. . . .I believe that her current complaints of pain aggravated by working such as sitting for prolonged periods and standing are real and probably are limiting her capacity for employment at this time."

*The benefit record does not describe any attempt by Mrs. Callahan to return to work after the chymopapain injection.

Dr. Chesley Yelton, South Central Bell's orthopedic consultant, reviewed Dr. Winter's narrative on July 30, 1985, and advised it did not change his preciously expressed opinion that the objective findings described on examination were not sufficient to prevent this individual to return to work as a stenographer.

APPENDIX G

South Central Bell
Employees' Benefit Committee P. O. Box 771
Floyd W. Smith Birmingham, Alabama 35201
Secretary
Mrs. Beverly T. Dodson
Assistant Secretary

May 15, 1985

Mr. John F. Tooley, Jr.
Attorney at Law
743 Terry Parkway
Gretna, Louisiana 70053

Dear Mr. Tooley:

The Employees' Benefit Committee in its meeting of May 15, 1985 reviewed Mrs. Dolores B. Callahan's application for sickness disability benefits for her absence from March 27, 1985 through April 1, 1985.

After discussing the medical information, the Benefit Committee found that her application must be denied. Examination by Dr. A. N. Diodene onn January 11, 1985 indicated that Mrs. Callahan was able to return to sedentary work. Dr. Diodene rendered this opinion after he reviewed her X-rays in March, 1985. Examination by Dr. R. A. Spector, an otolaryngologist, on March 25, 1985, also indicated that she should be able to return to her usual work with respect to the diagnosis of Meniere's syndrone. South Central's Medical Consultant reviewed these findings and advised that she should be able to return to her usual work as a stenographer. The Benefit Committee noted also that she had been able to engage in normal activities including

shopping and driving. Thus, the Committee found that her absence did not qualify for sickness disability benefits under Section 4, Paragraph 1 of the Sickness and Accident Disability Benefit Plan which limits such payment to physical disability to work by reason of sickness.

The above decision means that Mrs. Callahan's continued absence from work is not for valid cause based on the medical information. She should contact her Supervisor immediately about her intentions with respect to continuing her employment.

Mrs. Callahan may appeal this determination and have it reviewed by the Employees' Benefit Claim Review Committee. Her appeal should be in writing and must be made within sixty (60) days from the date this notice is postmarked. The address to which the appeal should be mailed is an follows:

Mrs. Jill Miller, Secretary
Employees' Benefit Claim Review Commission
Committee
South Central Bell Telephone Company
Post Office Box 771
Birmingham, Alabama 35201

Mrs. Callahan should appeal if she believes that the record on which the Benefit Committee made its decision was incomplete or incorrect. Her appeal should include medical information about her need to be away from work during the above period. All information submitted will be treated in a confidential manner and used solely for the purpose of determining her entitlement to sickness benefits. She should be sure that all such information is submitted within the sixty day period specidied above.

If Mrs. Callahan appeals, the Review Committee will make its decision within 60 days receipt of her written appeal and will notify her of its decision.

If she does not appeal within 60 days from the date this letter is postmarked, the determination of the Employees' Benefit Committee shall become final, and the case will be closed.

Yours very truly,

Original signed by
Yloya W. Smith
Secretary
EMPLOYEES' BENEFIT COMMITTEE

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
OCT 15, 1986

DOLORES B. CALLAHAN wife of/and GERARD CALLAHAN — CIVIL ACTION

VERSUS — NO. 86-0453
SECTION H
Mag. 1

SOUTH CENTRAL BELL TELEPHONE COMPANY, BELL SYSTEM SAVINGS AND SECURITY PLAN and BANKERS TRUST COMPANY

FILED: _____ _____
DEPUTY CLERK

FACTS

Mrs. Callahan she was entitled to Benefits as per the Sickness and Accident Disability Benefit Plan (Exhibit A) and extended benefits (Exhibit B). She was told that she would receive 50% of her salary until age 65 in accordance with those plans. (Exhibit C, Affidavit).

Counsel deposed most of those involved in the Benefit hearing to try and find out how and why this could occur. It was simple. When Mr. Evans took over as supervisor of Plaintiff's office he tried to eliminate work staff and cut the budget. (Exhibit D, Deposition of Mr. Evans, pgs. 6-12). He required Virginia Roper, plaintiff's former Supervisor, to make a supervisory visit, where she fould

plaintiff totally disabled. (Exhibit E, Virginia Roper deposition, pgs. 8 and 9). He also asked Carolyn LeGrange to make a report on plaintiff, (Exhibit F).Both reports sent to the Review Committee were intentionally phrased to indicate a lack of disability, although the depositions show a clear disability. (Also see Exhibit L and M, her physician's reports).

The young lady who typed the information forwarded to the Benefit Committee, Debra Heilman Gravois, (Exhibit G, Deposition of Debra Gravois) became an advocate for Mr. Pete Evans and arbitrarily phrased the Medical Review Panel report in an adversary position against plaintiff. (South Central Bell Exhibit C-30).

Although petitioner was advised that the Sickness and Accident Benefit were the same, they arose from different Sections of South Central Bell and her accident disability was arbitrarily determined by Mrs. Enola Fee and Georgianna McAlister to be sickness rather than accident caused, which was never submitted to the Medical Review Panel. (Exhibit H and I, Depositions of Enola Fee and Georgianna McAlister).

Mrs. Debra Heilman Gravois made the appointments with the Doctors (Exhibit G, pgs. 17 and 18) but never gave their own medical experts report to each other and, had she done so, Dr. Diodene (Exhibit J, Deposition of Dr. Diodene) clearly would have said that this lady was totally disabled. (Exhibit J, pgs. 32-36).

It was also determined that under the Medical Review Panel System the appeal is to the Secretary's secretary. (Exhibit K, pgs. 6-11). The entire System was mis-used to retire this lady and deny her her job and the benefits to which she was entitled, all to cut the budget for a new manager's reputation.

The Review Committee relies on their experts and do not give the weight the law exacts to the opinions of the treating physician. (Exhibit K, pgs. 29-38). In fact the Committee finding placed the burden on the treating physician. (South Central Bell Exhibit C-30).

LAW

Because of the intentional feeding of incorrect and slanted information to the Committee, and the misuse by them of obvious legal proceedures, this is a case of discrimination. *Ranson vs. Sears Roebuck and Co.,* 615 F.S. 1546 (D.C. Colo. - 1985).

RESPECTFULLY SUBMITTED

/s/John F. Tooley

HOHN F. TOOLEY, JR.
418 Wright Avenue
Gretna, Louisiana 70056
Telephone: (504) 364-1076

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY THAT I HAVE ON THIS 15 DAY OF OCT. 1986 SERVED A COPY OF THE FOREGOING PLEADING ON COUNSEL FOR ALL PARTIES TO THIS PROCEED BY MAILING THE SAME BY UNITED STATES MAIL. PROPERLY ADDRESSED AND FIRST CLASS POSTAGE PREPAID.
by hand /s/John F.Tooley,Jr.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DOLORES B. CALLAHAN wife of/and GERALD CALLAHAN — CIVIL ACTION

VERSUS — NO. 86-0453
SECTION "H"
Mag. 1

SOUTH CENTRAL BELL TELEPHONE COMPANY, BELL SYSTEM SAVINGS AND SECURITY PLAN and BANKERS TRUST COMPANY

FILED: _____ _____
DEPUTY CLERK

A F F I D A V I T

STATE OF LOUISIANA

PARISH OF JEFFERSON

PERSONALLY before me came and appeared DOLORES B. CALLAHAN, who, after being duly sworn, deposed and said:

That the hand writen items, Exhibit C, are her statement herein; that she truly believed that she was forced to retire in an arbitrary manner; that employees of South Central Bell arbitrarily and capriciously forced the system to deny her rights; that she was told exactly oposite of what was done by South Central Bell employees; and that she is entitled to all of the benefits as proscribed, to Workmens

Compensation and to damages for her forced retirement due to her age and disability.

/s/Dolores B. Callahan
DOLORES B. CALLAHAN

Sworn to and subscribed
before me this 15 day
of October, 1986.
/s/ John F. Tooley,Jr.
NOTARY PUBLIC

EXHIBIT C

handwritten copy

July 7, 1983

My last Benefit payment 4-1-85. My Blue Cross was discontinued, Supplementory Insurance stopped. Since July, 1983, I was told to go back to work by Debbie H. I told her Dr. Winters did not want me to go back. She said I would lose my job. I cl'd the Union and spoke to Freddie Green, he said do not go back listen to the Dr. Debbie cl'd and said I was to see Dr. Diodene, he examined me and said when he got xrays from Dr. Winters he would report to S.C.B. When Dr. Diodene said to go back to work there was no way I could work there are days when I can hardly get out of bed. Sometimes I feel good sometines I do not. Between my back hurting my hip and down my leg. I have problems with my head, dizziness, nausea and just sick. One morning my son had to rush me to the hospital. I try very hard to do little things. I do not want to be an invalid and I must move around, when I go to the store I ask the cashiers to give me little bags. I drive to the Shopping Center and walk and to the grocery. I do not go very far in the car alone.

I knew S.C.B. would not do anything to hurt me because I felt I was a good employee, therefore I did not keep records of any kind or bother to remember dates. I had no intention of ever seeing an attorney, but S.C.B. in turn stopped everything on me and asked me to retire. Iris Guidry came to my home with papers to sign. She said she needed them back like immediately. I told her I could not sign anything unless I spoke to the Union. Freddie Green told me not to sign. I did not want to retire then when I signed papers. I really did not retire until abt. June 1986. I had to do something, my Blue Cross was stopped; my profit sharing was stopped. I was forced to retire.

Dr. Winters talked abt. surgery on my hip prior to the the accident at S.C.B. If I can recall correctly after the accident at S.C.B. the pain went into my back and legs, Dr. Winters.

My prior injury was the hip, after the accident at work it was my back (lower), hip and leg. I tried many times to work but had to leave. I did not want to lose my job. I have my grandchildren with me frequently. they would go to the Shopping Center with me & walk with me. I love having them around me they help me physically, as well as mentally.

Steno-type for mgr. abt. 4 Supervisors, all Service Reps abt. 30 I am not sure. file - I told Iris Guidry I could not file, it hurt my back. I don't remember what she said but she was not happy. Run Zerox machine run morning machine for times for Reps, Receive supplies, Order supplies, put away supplies on shelves, many times I had to ask for help with boxes I couldn't carry answer phone for manager - supervisors and reps - take messages and bring to each.

When the accident occurred at work I did not want to make a scene. I tried to be very calm. Stella Clements, Supervisor, was called and came to me. She asked if I was OK. I was upset because I had an injury to my hip and leg prior to this but when I tripped at S.C.B. my body twisted and I turned to grab on to the desk alongside of me. Karen Blanchard, Service Rep. was a few feet away from me, she saw what happened and heard my bone crack. I think it was my hip that cracked. I am not really sure. Karen asked if I was OK. I said I hope so. Later in the day my back started to hurt and I think Stella Clements took me to Dr. Winters, he said this did aggravate my old injury and it went into my back. As time went on I tried to go to work but I had to leave several times. Dr. Winters sent a

certificate for just 4 hours a day and Iris nor Nell St. Pe' mgr at the time were happy abt. this. About this time I was getting dizzy and nausea and didn't know the reason. I went to Dr. Haindel and he said it was Menieure's Disease. So, all in all I have had many problems. Many days I just lay on the sofa. For months on end I didn't do anything but lay with heat to my back. I could not do any work in the house, so consequently just laying and eating I now have diabetes.

I did not want my life to be this way. I am trying very hard to live a normal life and enjoy my grandchildren. Without my husband and family I would not have the will to push, but because of them I am doing better. My grandchildren are the reason I push myself out of bed many mornings. I never tried to blame S.C.B. for my accident, but S.C.B. has really let me down. I still have many problems with my back and leg. I cannot do many things I always did before. I had to give up my high heels as well. Dr. Winters said I should be on disability with S.C.B., also Dr. Rozas. S.C.B. said No. The Union was working on this also. Dr. Winters and the good Lord are doing wonders for me.

Dottie Leonard -347-0090 became a Steno after I left. She was told I was still on disability & she was not taking my place, there were going to be other Steno's coming in - 2 or 3 - Dottie said Pete Evans harrassed her so much she asked to resign. She received $2,000. Cash and 26 weeks unemployment. In a meeting with Pete Evans, Dottie said his words to her were: My next step is suspension, then termination. His words were "I can do what I want to do. I feel this is what went on about me as well. Chris Pierre took my place - She is in Pete Evans ofc. - Pete reports to Milton Dinkel - Carol LaGrange is in Dinkel's ofc - Chris and Carol are very good friends. Dottie Leonard will give you a statement of everything.

APPENDIX I

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DOLORES B. CALLAHAN wife of/ and GERARD CALLAHAN — CIVIL ACTION

VERSUS — NO. 86-0453

SECTION "H", MAG. 1

SOUTH CENTRAL BELL TELEPHONE COMPANY, BELL SYSTEM SAVINGS AND SECURITY PLAN and BANKERS TRUST COMPANY

Received Oct. 16, 86

SUPPLEMENTAL OPPOSITION TO SUMMARY JUDGMENT

Petitioner annexes hereto the exhibits L and M, the medical reports of Doctors Winters and Rozas, which were inadvertantly omitted.

Petitioners more definitely clearify their statements of contested facts.

RESPECTFULLY SUBMITTED

/s/John F. Tooley, Jr.

JOHN F. TOOLEY, JR.
418 Wright Avenue
Gretna, Louisiana 70056
Telephone: (504) 364-1076

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY THAT I HAVE ON THIS 16th DAY OF Oct 1986 SERVED A COPY OF THE FOREGOING PLEADING ON COUNSEL FOR ALL PARTIES TO THIS PROCEED BY MAILING THE SAME BY UNITED STATES MAIL, PROPERLY ADDRESSED AND FIRST CLASS POSTAGE PREPAID.

/s/ John F. Tooley, Jr.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DOLORES B. CALLAHAN wife of/ and GERARD CALLAHAN — CIVIL ACTION

VERSUS — NO. 86-0453

SECTION "H", MAG. 1

SOUTH CENTRAL BELL TELEPHONE COMPANY, BELL SYSTEM SAVINGS AND SECURITY PLAN and BANKERS TRUST COMPANY

MORE DEFINITE STATEMENT OF CONTESTED FACTS

I.

That Sickness and Disability Section of South Central Bell is intimately related to the Review Panel in Birmingham and the entire South Central Bell disability System is subject to intentional abuse.

II.

When a Mr. Pete Evans took over that section where petitioner worked he instigated personnel changes, one of which was to eliminate those on disability in his section, and more particularly Dolores B. Callahan.

III.

That working with the local Disability Section they put together slanted, inaccurate and incorrect information, which is the basis of the Review Panel's decision.

IV.

The Review Panal itself contrary to law accepts the medical opinion of their experts however inaccurate without regard to the legal status of the opinion of the treating physician.

V.

The appeal from the Review Panel is to the Chairmen's secretary!

VI.

All of the foregoing was done by South Central Bell employees who knowingly deprived Dolores B. Callahan of her benefits because of her age and disability.

/s/ Dolores B. Callahan
DOLORES B. CALLAHAN

Sworn to and subscribed
before me this 16th day
of October, 1986.

/s/ John Tooley
NOTARY PUBLIC

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY THAT I HAVE ON THIS 16th DAY OF Oct 1986 SERVED A COPY OF THE FOREGOING PLEADING ON COUNSEL FOR ALL PARTIES TO THIS PROCEED BY MAILING THE SAME BY UNITED STATES MAIL PROPERLY ADDRESSED AND FIRST CLASS POSTAGE PREPAID.

/s/ John Tooley

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
OCT 23,1986

DOLORES B. CALLAHAN wife of/ and GERARD CALLAHAN — CIVIL ACTION

VERSUS — NO. 86-453
SECTION "H"

SOUTH CENTRAL BELL TELEPHONE COMPANY, BELL SYSTEM SAVINGS AND SECURITY PLAN and BANKERS TRUST COMPANY

J U D G M E N T

For the oral reasons dictated into the record,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, South Central Bell Telephone Company, and against plaintiffs, Deloris B. Callahan, wife of/and Gerald Callahan, dismissing without prejudice plaintiffs' complaint at their cost.

New Orleans, Louisiana, this day of October, 1986.

/s/ illegible
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY OCT 23 1986

APPENDIX K

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
OCT 30, 1986

DOLORES B. CALLAHAN wife of/and GERARD CALLAHAN — CIVIL ACTION

VERSUS — NO. 86-0453
SECTION H
Mag. 1

SOUTH CENTRAL BELL TELEPHONE COMPANY, BELL SYSTEM SAVINGS AND SECURITY PLAN and BANKERS TRUST COMPANY

FILED: _____ _____
DEPUTY CLERK

MOTION FOR NEW TRIAL UNDER RULE 59

On motion of undersigned cousnel and upon suggesting to the Court that the Dismissal of the name demand and the Supplemental Complaint on October 22, 1986 was improper for the reasons set forth in the exhibits and memorandum and the a re-hearing should be granted herein.

/s/ John F. Tooley, Jr.

JOHN F. TOOLEY, JR.,
418 Wright Avenue
Gretna, Louisiana 70056
Telephone: (504) 364-1076

PLEASE SERVE:

Nancy B. White
365 Canal Street, Room 1870
New Orleans, Louisiana 70140

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY THAT I HAVE ON THIS 30 DAY OF OCT, 86 SERVED A COPY OF THE FOREGOING PLEADING ON COUNSEL FOR ALL PARTIES TO THIS PROCEED BY MAILING THE SAME BY UNITED STATES MAIL. PROPERLY ADDRESSED AND FIRST CLASS POSTAGE PREPAID.
by hand:
/s/John F.Tooley, Jr.

APPENDIX L

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
DEC 1 1986

DOLORES B. CALLAHAN ET AL/	CIVIL ACTION
VS.	NO. 86-0453
SOUTH CENTRAL BELL	SECTION "H"

Plaintiff's "motion for a new trial under Rule 59" is treated as a motion to alter or amend judgment. (Rule 59(e), F.R.C.P.). The motion was considered this date on memoranda. The motion is DENIED. The judgment is correct, for the reasons stated orally at the previous hearing.

Defendant's motion for sanctions is DENIED.

/s/ illegible

DATE OF ENTRY DEC 2 1986

APPENDIX M

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
DEC 12 '86

DOLORES B. CALLAHAN wife of/and GERARD CALLAHAN — CIVIL ACTION

VERSUS — NO. 86-0453
SECTION H
Mag. 1

SOUTH CENTRAL BELL TELEPHONE COMPANY, BELL SYSTEM SAVINGS AND SECURITY PLAN and BANKERS TRUST COMPANY

FILED: _____ _____
DEPUTY CLERK

NOTICE OF APPEAL

PLEASE TAKE NOTICE that plaintiffs, Dolores B. Callahan wife of/and Gerald Callahan hereby appeals the orders of this Court of December 2, 1986 and October 22, 1986 to the United States 5th Circuit Court of Appeals.

/s/ John F. Tooley, Jr.
JOHN F. TOOLEY, JR.,
418 Wright Avenue
Gretna, Louisiana 70056
Telephone: (504) 364-1076

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY THAT I HAVE ON THIS 5 DAY OF DEC, 1986 SERVED A COPY OF THE FOREGOING PLEADING ON COUSEL FOR ALL PARTIES TO THIS PROCEED BY MAILING THE SAME BY UNITED STATES MAIL, PROPERLY ADDRESSED, AND FIRST CLASS POSTAGE PREPAID.

/s/John F. Tooley, Jr.

APPENDIX N

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
DEC 12 1986

DOLORES B. CALLAHAN wife
oa/and GERARD CALLAHAN — CIVIL ACTION

VERSUS — NO. 86-0453

SOUTH CENTRAL BELL TELEPHONE
COMPANY, BELL SYSTEMSECTION "H", SAVINGS
AND — MAG. 1
SECURITY PLAN and BANKERS
TRUST COMPANY

FILED _____ _____
DEPUTY CLERK

COMPOSITION OF RECORD

Appellent specifies all of the original records of the Court and certified copies of all docket enteries. No Transcript was ordered as no testimony was ever taken and the matter was Dismissed on Motions only.

/s/ John F. Tooley, Jr.

JOHN F. TOOLEY, JR.
418 Wright Avenue
Gretna, Louisiana 70056
Telephone: (504) 364-1076

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY THAT I HAVE ON THIS 5th DAY OF Dec 1986 SERVED A COPY OF THE FOREGOING PLEADING ON COUNSEL FOR ALL PARTIES TO THIS PROCEED BY MAILING THE SAME BY UNITED STATES MAIL, PROPERLY ADDRESSED AND FIRST CLASS POSTAGE PREPAID.

/s/ John F. Tooley, Jr.

APPENDIX O

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-3892
Summary Calendar

DOLORES B. CALLAHAN, WIFE OF/AND
GERARD CALLAHAN,

Plaintiffs-Appellants

versus

SOUTH CENTRAL BELL TELEPHONE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-86-0453-H)

(May 14, 1987)

Before POLITZ, WILLIAMS, and JONES, Circuit Judges.*

Edith H. Jones, Circuit Judge:

This appeal arises from a lawsuit brought by appellant to recover one week's worth of sickness disability benefits allegedly owed by Mrs. Callahan's former employer, South Central Bell Co. ("Bell"). The Callahans

*1 Local Rule 47.5 provides: "The publication of opinions that have no precendential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

alleged that Bell's failure to pay benefits violated the Employee Retirement Income Security Act of 1974 ("ERISA"). The district court granted summary judgment in favor of Bell and dismissed without prejudice the Callahans' amended complaint, which was not served on Bell within 120 days of its filing. Finding neither abuse of judicial discretion nor plain error, we AFFIRM. We further award sanctions against the Callahan's counsel in the amount of $500 for pursuing a frivolous appeal, whose cost to the parties and to the judicial system on the appellate level alone far exceeds any remote hope of success that appellants probably did not have. 28 U.S.C. § 1912, F.R.App.Proc. 38.

Dolores B. Callahan was employed as a stenographer for Bell. On April 12, 1984, Mrs. Callahan reported out from work with a condition she described as "bank problems." Bell paid Mrs. Callahan weekly sickness disability payments, for nearly one year, through March 26, 1985 under Bell's Sickness and Accident Disability Plan, a plan maintained pursuant to ERISA. Mrs. Callahan was eligible for possible benefits extending to April 1, 1985.

On March 26, 1985, Bell's Medical Benefit Reviewer notified Mrs. Callahan that her sickness disability benefits would not be paid beyond March 26, 1985 and that she was expected to return on March 27, 1985. The benefits were terminated because a review of Mrs. Callahan's continued eligibility for benefits indicated that she should be able to return to work at her sedentary position. Mrs. Callahan did not return to her job.

Both the Employees' Benefit Committee and the Employees' Benefit Claim Review Committee, its appellate counter-part, found that Mrs. Callahan's absence was not covered by Bell's benefit plan because the voluminous medical evidence submitted by all parties did not describe

an injury severe enough to substantiate benefit payments for the period in question, March 27, 1985 to April 1, 1985.

The Callahans filed suit against Bell, Bell System Savings and Security Plan, and Bankers Trust Company in the U.S. District Court for the Eastern District of Louisiana (Bell System Savings and Bankers Trust were later voluntarily dismissed.) A Supplemental and Amending Complaint was later filed on behalf of the Callahans alleging wrongful termination in virtually unintelligible terms. The district court granted summary judgment for Bell and dismissed the Callahans' Supplemental and Amending Complaint without prejudice.

The Callahans allege that the district court's dismissal, without prejudice, of their Supplemental and Amending Petition pursuant to Rule 4(j) of the Federal Rules of Civil Procedure was inappropriate. The Supplemental and Amending Complaint, which appellants attempted to serve on Bell by the issuance of a new summons, was not served with the 120-day limit specified in Rule 4(j). It was served nearly seven months later. The district court's dismissal of a complaint pursuant to Rule 4(j) will not be overturned unless the district court abused its discretion. Moreover, the decision as to whether good cause has been shown to extend that period lies within the sound discretion of the trial court. **Winters v. Teledyne Movible Offshore, Inc.**, 776 F.2d 1304, 1305 (5th Cir. 1985). The plaintiff must show good faith and a reasonable basis for noncompliance. **Winters**, 776 F.2d 1306. A lessor showing of excusable neglect, as with simple inadvertence, mistake of counsel, or ignorance of the rules, will usually not suffice. *Id.* Since the Callahans have failed to show any abuse of the district court's discretion in dismissing their amended complaint without prejudice, we uphold this ruling by the district court.

The Callahans further allege that the district court erred in granting summary judgment for Bell and in basing its decision on the "arbitrary and capicious" standard of review. In civil actions challenging decisions of ERISA benefit plan committees, this circuit has consistently held that the committee's conduct in administering plans must be sustained as a matter of law unless the plaintiff can prove that such conduct has been "arbitrary or capricious." **Bayles v. Central States, Southeast and Southwest Areas Pension Fund**, 602 F.2d 97, 99 (5th Cir. 1979). **See also Glover v. South Central Bell Tel. Co.**, 644 F.2d 1155, 1157 (5th Cir. 1981); **Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.**, 637 F.2d 357, 362 (5th Cir.), *cert. denied*, 454 U.S. 836, 102 S. Ct. 140, 70 L. Ed. 2d 117 (1981).

The only pertinent comment in the Callahans' brief that bears on this issue is their contention that Bell's Review Committee made an "error of law" in not affording the opinion of Mrs. Callahan's treating physician the "legal import" required by law. However, the Callahans cite no case or statute requiring the opinions of treating physicians in ERISA cases to be accorded a greater weight than the opinions of other examining physicians.

Applying the "arbitrary and capricious" standard of review to the present case, it is clear that the district court did not err in granting Bell's motion for summary judgment. A detailed examination of the record indicates that Bell's Review Committee did not act arbitrarily or capriciously and that the denial of benefits for absences after March 26, 1985 was reasonable based on the evidence submitted to that committee. The minutes of Bell's Review Committee indicate that the committee considered all the evidence in Mrs. Callahan's records. Conflicting medical reports were evaluated through all stages of the administrative process. An otolaryngologist and an

orthopaedic specialist both concluded that Mrs. Callahan was able to perform the sedentary work required by her job as a stenographer. The record indicates that Bell's Review Committee considered the conflicting medical evidence before making the final decision to deny benefits. Therefore, the record establishes bases in fact for the decision of Bell's Review Committee.

The Callahans' pursuit of an appeal in this case is mystifying. We do not know the exact amount of money in issue, but it has not justified the taking of eight depositions or the accumulation of voluminous medical evidence for a four-day-long denial of benefits. The Callahans' brief on appeal makes a mockery of the concept of reasoned argument, as its substantive section occupies one page and the recitation of facts is disjointed and largely immaterial. For these reasons, we asess the sanctions indicated above, and order that it be paid to Bell.

The district court's judgment, as amended to include the foregoing award of sanctions, is accordingly AFFIRMED.

86-3892

In the United States Court of Appeals
FOR THE FIFTH CIRCUIT

NO. 86-3892

DOLORES B. CALLAHAN wife
of/and GERARD CALLAHAN
Plaintiffs-Appellants

versus

SOUTH CENTRAL BELL TELEPHONE COMPANY
Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA NEW ORLEANS DIVISION

PETITION FOR EN BANC CONSIDERATION ON RE-HEARING

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Attorney for Dolores B. Callahan
wife of/and Gerald Callahan

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. There representations are made in order that the Judge of this Court may evaluate disqualifications or refusal.

1. Dolores B. and Gerald Callahan, appellants.
2. John F. Tooley, Jr., attorney for appellants.
3. South Central Bell Telephone Company, appellee.
4. Nancy B. White, attorney for South Central Bell Telephone company, appellee.

RESPECTFULLY SUBMITTED

/s/ John F. Tooley, Jr.

JOHN F. TOOLEY, JR.
418 Wright Avenue
Gretna, Louisiana 70056
Telephone: (504) 364-1076
Attorney for Mr. and Mrs. Callahan, Plaintiffs-Appellants

A-82

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance.

After discussing the facts of this case and the statute involved with Labor Law specialtists, along with extensive research, counsel does not believe that any Court has fully or adequately interpreted the law involved except, *Seafarers Pension Plan vs. Sturgis*, 630 F.2d 218 (CA 4-1980) and *Bickle vs. Long Term Disability Plan of Western Electric*, 541 F. Supp. 685 (E.D.Pa.-1982). Additionally, it is not clear what a trial Court should order if the Committee's decision is found unsound. This Court should do so by En Banc Consideration.

RESPECTFULLY SUBMITTED

/s/ John F. Tooley, Jr.

JOHN F. TOOLEY, JR.
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A-85

STATEMENT OF JURISDICTION

This action arises out of the Employee Retirement Security Act, 29 United States Code, wherein this Federal Court is specifically granted jurisdiction.

/s/ John F. Tooley, Jr.

JOHN F. TOOLEY, JR.
418 Wright Avenue
Gretna, Louisiana 70056
Telephone: (504) 364-1076

STATEMENT OF THE ISSUES

The Panel misapprehended the amount involved, the issue before the Court and the reasons for and content of the depositions taken. (Opinion annexed hereto).

It was mystified by a claim for a 4-day denial of benefits. That was the technical limit of the one year balance under the contract for 100% pay. Following that she would be entitled to 50% of her pay for the life of her disability. That was clearly shown in the contract and page 32 of the Record Excerpts. Fifty percent of ones' pay for life is vital to a disabled lady with no other means of support. That should have been of no moment, however, as Mrs. Callahan's action is clearly a Federal right under the Statute.

Counsel is not a Labor specialist and immediately so informed his clients. With set time limits, counsel filed what he thought appropriate to protect his clients' rights while seeking an expert for referral, all without success. Some 8-10 attorneys were helpful with advice, but were not in a position to otherwise help. All did feel that an issue of fact was presented and the claim under 29 U.S.C. 1132 was properly presented. At considerable expense to Mrs. Callahan, which she could ill-afford, one ex-professor did advise that other claims made should be dismissed and that was done. On May 18, 1987 the Time-Picayune quoted Supreme Court Justice WIlliam Brennan that "Every lawyer, no matter how well established *and regardless of his specialty,* can and must contribute to the elimination of inequities. . .". (Italics by counsel). WIthin the jurisdiction of the Fifth Circuit counsel is fined for doing so.

The sole issue before the Panel and this Court is whether or not a question of fact was presented in opposition to the Motion for Summary Judgment. The depositions, Affidavits and exhibits did exactly that.

ARGUMENT AND AUTHORITIES

The Review Committee in Birmingham found that the reports of the treating physicians "did not override the opinions of Dr. Spector and Dr. Diodene", i.e., the two Company doctors. (Record Excerpt, p.p.48-9). That is an error of law as a denial of the great weight attached to the opinion of treating physicians.[1] That rule is so well known to injury trial counsel and Judges that citations of authority were difficult to find, but only inadvertently omitted from the original brief. It is particularly apt in this case as the Company failed to provide their own physicians reports to each other, and at deposition, Dr. Diodene clearly stated that he would reassess his opinion had he had Dr. Spector's report. (Record Excerpts, p.p. 87-91). On its face the decision of the Review Committee is clearly erroneons; ergo, arbitrary and capricious. Their misapplication of the rule is a fact in dispute.

In addition, plaintiffs showed that the Review Committee's decision in Birmingham was based upon arbitrarily and caprisiously flawed, false, slanted and otherwise inaccurate information furnished to them by the New Orleans office. The New Orleans office is a fundemental part of the appeal proceedure and actually prepares and forwards the information for the Minutes of the Committee in Birmingham. (Record Excerpt, p.p. 66-7 and 74). The Fifth Circuit and the trial Courts with its jurisdiction appear to treat a Review Committee's decision and Minutes as it would a search warrant --- one cannot beyond the four corners of the instrument and summary judgments are always granted without regard to the accuracy of the infor-

---

[1] *Schouest vs. J. Ray McDermott and Co., Inc.*, 411 So.2d 1042 (Supp.Ct.La.-1982, *Ramsey vs. Dragon, Ltd.*, 448 So.2d 745 (La.App. 4-1984) and *Bourgeois vs. Bill Watson's Investments, Inc.*, 458 So.2d 167 (La.App. 5-1984).

mation furnished in the start of the process. These facts plaintiffs challenged and where the roots are denied the tree is poisoned and a trial should ensue. This Court, en banc, should so order.

If plaintiffs prevail at trial, the Court en banc should also state what remedies are available to the trier of fact under the Statute, which seems unclear.[2]

CONCLUSION

This Court should reverse and remand for trial in the U. S. District Court, which, after the evidence is completed, should be directed under the Statute to rule on the complaint or to remand to the South Central Bell Review Committee to reassess the evidence in accordance with Law.

/s/ John F. Tooley, Jr.
JOHN F. TOOLEY, JR.
418 Wright Avenue
Gretna, Louisiana 70056
Telephone: (504) 364-1076

---

2 *Seafarers Pension Plan vs. Sturgis*, 630 F.2d 218 (C.A. 4-1980); and *Bickle vs. Long Term Disability Plan of Western Electric*, 541 F.Supp. 685 (E.D.Pa. 1982).

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 28th day of May, 1987 served a copy of the foregoing pleadings on counsel for all parties to this proceed by mailing the same by United States Mail, properly addressed, and First Class postage prepaid.

/s/ John F. Tooley, Jr.

JOHN F. TOOLEY, JR.
418 Wright Avenue
Gretna, Louisiana 70056
Telephone: (504) 364-1076

APPENDIX Q

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed
JUL 24, 1987

No. 86-3892
Summary Calendar

DOLORES B. CALLAHAN, WIFE OF/AND
GERARD CALLAHAN,

Plaintiffs-Appellants

versus

SOUTH CENTRAL BELL TELEPHONE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

ORDER ON REHEARING

(July 24, 1987)

Before POLITZ, WILLIAMS, and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:*

Having considered the motion of appellants for rehearing and the joint motion for partial dismissal, the Court grants rehearing and adhears to its prior opinion affirming the district court's grant of summary judgment in

*1 Local Rule 47.5 provides: "The publication of opinions that have no precendential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

regard to appellants' claims under ERISA. The Court, however, withdraws that portion of its opinion dealing with dismissal of the claim for wrongful termination based on discrimination in light of the parties' joint motion to dismiss that part of appellants' appeal with prejudice. The motion was filed essentially contemporaneously with this Court's original opinion and renders that portion of our opinion moot, Finally, the Court withdraws that portion of its prior opinion awarding sanctions to South Central Bell Telephone, because we have been corrected in our assumption that appellants' lawsuit sought only four days worth of disability benefits from South Central Bell. Appellants' appeal cannot be deemed frivolous when it arose out of a claim for life time disability benefits.

In sum, we **AFFIRM** the district court's summary judgment in behalf of appellee in the ERISA claim, withdraw our award of sanctions, and withdraw our ruling on appellants' discrimination claim.